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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~324~~ 69.

THE UNITED STATES, APPELLANT,

vs.

THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, DECEASED, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

FILED JULY 3, 1905.

(19826.)

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1 *Caption.*

Be it remembered that at a term of the District Court of the United States, in and for the Southern District of Florida, begun and holden at Jacksonville, Florida, on the first Monday of December, A. D. 1904, and which term has not yet finally adjourned, the Hon. James W. Locke, United States district judge, presiding, the following proceedings were had, and the following cause came on for trial and was decided, to wit:

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES. } No. 210. Petition.

2 *Notice of application to restore record.*

In the District Court of the United States for the Southern District of Florida.

To Honorable JOSEPH N. STRIPLING,
United States Attorney for the Southern District of Florida.

SIR: Please take notice that I have this day presented to the Honorable James W. Locke, judge of the District Court of the United States for the Southern District of Florida, a petition by and on behalf of persons interested in the suit pending in the District Court of the United States for the Northern District of Florida at the date of the act of Congress approved the 23rd day of July, 1894, and by said act transferred into the Southern District, the record and files which were destroyed by the fire which burned the court-house at Jacksonville, Florida, on or about the 19th day of May, A. D. 1891, setting out the destruction of the record and files of said suit, and praying for the restoration thereof according to the statute in such case made and provided.

The title of said cause is Dalcour et al. vs. The United States, and said suit was instituted for the confirmation of a grant of land in Florida made by the lawful authorities of the King of Spain to John Forbes and Company on the 10th day of January, A. D. 1818.

A copy of the petition filed is hereto attached, and you are advised that a hearing upon said petition has been ordered by the said court upon the third day of December next, being more than sixty days after service of this notice.

W. W. DEWHURST,
Attorney for Petitioners.

Service of this notice and copy of the petition therein referred to received this 14th day of June, A. D. 1900.

J. N. STRIPLING,
U. S. Dist. Atty. So. Dist. of Florida.

(The foregoing is indorsed): "#210. U. L. 2. In the District Court of the United States for the Southern District of Florida. Dalcour et al. vs. The United States of America. Notice of application to restore the record. Filed June 15th, 1900. E. O. Locke, clerk."

* * * * * * *

7 *Amended petition for restoration of record.*

In the District Court of the United States for the Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

To the Honorable JAMES W. LOCKE,
Judge of the District Court of the United States for the Southern District of Florida:

Leave of court having been given, the original petition filed herein is amended to read as follows:

The undersigned as attorney for numerous of the persons mentioned in the suit pending in the District Court of the United States for the Northern District of Florida on the 23rd day of July, A. D. 1894 (and by act of Congress entitled "An act to change the boundaries of the judicial districts of the State of Florida," approved July 23rd, A. D. 1894, transferred into the District Court of the United States for the Southern District of Florida), wherein Theodore Dalcour et al., representing John Forbes, Henrietta Innerarity, widow of Henry Wilson, and others, representing John Innerarity; and Eloise or Eilza Innerarity, widow of Louis Minor, and others, representing James Innerarity, were complainants or petitioners and the United States of America was defendant; respectfully show unto your honor;

(On February 7th, 1901, the foregoing was amended as follows:)

In the District Court of the United States, Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

Comes now on this 7th day of February, A. D. 1901, the parties next hereinafter named, by W. W. Dewhurst, their attorney, and leave of the court having been given, amend their amended petition of restora-
8 tion filed in this cause, by substituting in the introductory part thereof the following in the place of the introduction in said amended petition, so that the introductory part thereof or first paragraph shall read as follows:

Heloise or Eliza Innerarity, widow of John S. Barton, of New Orleans, State of Louisiana, and Heloise or Eliza I. Minor, widow of Louis Minor, of Norfolk, State of Virginia, heirs and descendants of James Innerarity; Emma Hulse Taylor, of Pensacola, State of Florida, and Albert P. Hulse, formerly of Bay St. Louis, State of Mississippi, now of Los Angeles, State of California, and William H. Wilson, heirs and descendants of John Innerarity; and Harriet F. Innerarity, wife of Le Breton Des Chappelles, joined by said E. Le Breton Des Chappelles, of New Orleans, State of Louisiana, and heir and descendant of both John Innerarity and James Innerarity; all of whom, except William H. Wilson,

were themselves original parties complainant therein, and who are severally persons interested in the records of the suits pending in the District Court of the United States for the Northern District of Florida, on the 23rd day of July, A. D. 1894 (and by the act of Congress, entitled "An act to change the boundaries of the judicial districts of the State of Florida," approved July 23rd, 1894, transferred into the District Court of the United States for the Southern District of Florida); wherein Theodore Dalcour et al., representing John Forbes, Henrietta or Harriet Victorie Innerarity, widow of Henry Wilson, and others, representing John Innerarity and Eloise or Eliza Innerarity, widow of Louis Minor, and others, representing James Innerarity, were complainants or petitioners, and the United States of America were defendants, in behalf of themselves and all others in like situation, parties to said suit, or their descendants or legal representatives, by W. W. Dewhurst, their attorney, respectfully show unto your honor.

W. W. DEWHURST,
Atty. for Petitioners.

(The foregoing is indorsed): "# 210. U. L. 2. District Court of the United States, So. Dist. of Florida. Dalcour et al. vs. The United States. Amendment to amended petition for restoration. Filed Feb. 7, 1901. E. O. Locke, clerk."

9 (1) That by the fire which burned the United States court-house in Jacksonville on May 19th, A. D. 1891, the record and the files in the above stated cause then pending in the District Court of the United States for the Northern District of Florida were wholly burned and destroyed;

(2) That said loss was without fault or negligence of the persons interested in said suit or any of them;

(3) That certified copies of said record and files can not be obtained by the persons interested in said suit or any of them;

(4) That the substance of said record and files so destroyed was an original petition to the judge of the District Court of the Northern District of Florida, duly verified, filed in said court on the third day of March, A. D. 1875, setting forth that Theodore Dalcour, of Matanzas, of the island of Cuba; Auguste Dalcour, of Ellicott Mills, Maryland; Sophia Dalcour, wife of Theodore Sanchez, of Slavador, Cuba, joined by her husband; Theresa Dalcour, joined by her husband, Eugene Bolivier, of Lafayette Parish, State of Louisiana; children of Sophia *of* Susan Forbes; Stephen Tennant and Henrietta Tennant, of Lancashire, England; Blanche Tennant, joined by her husband, Robert Bruce, of Scotland, and Jules Fontena, of Bayone, France; children of Cammilla Dalcour, who was a daughter of Susan Forbes; Edward Depestre and Louisa Depestre, of the island of Cuba, and Julie Depestre, joined by her husband, Jose M. Gonser, of London, England, as petitioners, filed their petition or suit against the United States by virtue of the act of Congress approved June 22, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and the extension of said act, praying for confirmation of title to them as the heirs of John Forbes of that grant of land made by the Government of Spain on the 10th day of January,

A. D. 1818, to John Forbes and Company, more particularly described as follows:

Commencing opposite to the mouth of Sweet Water Creek on
10 the Appalachicola River the line runs due west as far as the River Choctawhatchie, when it follows the course of said river to its mouth in the Bay of St. Rosa, then runs eastwardly along the shores of said bay and the sea (meaning the Gulf of Mexico) to the mouth of the Apalachicola River, and up said river to the place of commencement, being all the land between the Apalachicola River and the Chocktawhatchee, lying south of the township line dividing township one north from township two north, and containing the lands described on the United States surveys, as follows:

Township one north, ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 west.

One south, ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 west.

Two south, ranges 8 to 20 (inclusive) west.

Three south, ranges 8 to 17 (inclusive) west.

Four south, ranges 9 15 incl. west.

Five south, ranges 8 to 14 incl. west.

Six south, ranges 8 to 12 incl. west.

Seven south, ranges 8 to 11 incl. west.

Eight south, ranges 8 to 12 incl. west.

Nine south, ranges 7 to 11 incl. west.

That said petition further set out such other jurisdictional facts as it was necessary to allege to maintain the said suit in said court under the 11th section of said act of Congress approved June 22nd, 1860, and the act of June 10th, 1872, extending the same, and said petition had
11 attached thereto a plat of the United States survey of the lands claimed under the said grant according to the public surveys; a statement of the quantity of land in each township of the public surveys embraced in said grant; also an official statement made by the register of the United States land office at Gainesville of the whole area claimed and of the area thereof, which had, at about the date of the filing of said petition, been disposed of by the United States, and a statement of what area remained at said date undisposed of by the United States and treated as public land.

That said petition alleged the area within said grant according to the public surveys to be one million three hundred and seventy-five thousand six hundred thirty-seven $\frac{33}{100}$ acres; of which the *the* United States had disposed of was nine hundred and four thousand four hundred and sixty-two and forty-six one-hundredths acres of land; and alleged that four hundred and seventy-one thousand one hundred and seventy-one and eighty-six one-hundredths acres remained in possession of the United States undisposed of, not including the soil unde[illegible] Andrews Bay claimed to be a part of said grant; that with said pe[illegible] was a copy of the public survey of the lands claimed, made and certified [illegible] the surveyor-general of Florida, and also a copy of the report of the United States commissioners for the adjustment of land titles, which is printed in vol. 4 of the American State Papers, pages 95–96 inclusive; that said petition also prayed the confirmation of another grant of land made to John

Forbes for ten thousand acres of land, which grant is described in vol. 4, American State Papers, pages 221–262–283–464, and 465; for citation to be made upon the United States attorney for the Northern District of Florida and for judgment against the United States for the lands hereinbefore described, and a patent for such portions thereof as had not been theretofore disposed of by the United States and the issuance of script for such portions as had been disposed of by the United States and for general relief;

(5) That thereafter on the 14th day of December, A. D. 1878,
12 by leave of the court first had, said petitioners amended their said petition; that by said amended petition they joined as copetitioners, the following parties, to wit: Fanny W. J. Innerarity, as tutrix of Helen H. Innerarity, Louis Minor Innerarity, Emanuel S. Innerarity, Margaret Innerarity, and James J. Innerarity, of New Orleans, State of Louisiana, Fanny C. Innerarity joined by her husband, Cornelius E. Wykoff; Eloisa Innerarity joined be her husband James Wilson, of said New Orleans, State of Louisiana; Albert N. H. Innerarity, of Scott Station, State of Mississippi; Eliza Innerarity, widow of Louis Minor, of Norfolk, State of Virginia; James Innerarity, of Haidaye, France; Harriet F. Innerarity, joined by her husband E. Le Breton Deschappelles, Eliza Melanie Innerarity joined by her husband John S. Barton, of New Orleans, State of Louisiana; who alleged themselves to be descendants and heirs at law of James Innerarity, one of the partners of the firm of John Forbes and Company, suing in right of descent from said James Innerarity, Victoire Innerarity, Henrietta Innerarity, of New Orleans, State of Louisiana; Albert H. Huelse, of Bay St. Louis, State of Mississippi; Sarah Huelse as tutrix of her minor children John and Victoire Huelse, of Milton, State of Florida, and Emma Huelse Taylor, of Pensacola, State of Florida, who alleged themselves to be descendants and heirs at law of John Innerarity, the third partner of the firm of John Forbes and Company, and suing in right of descent from said John Innerarity; and alleged in the original petition that it had been by mistake alleged that the grant was made by Spain to John Forbes; that said grant had been made to John Forbes and Company; that at the date of said grant said copartnership consisted of John Forbes, John Innerarity, and James Innerarity, partners, equally, and that the petitioners named in said amended petition were the heirs of the persons composing the firm of John Forbes and Company; and said amended petition prayed the confirmation to said petitioners of the said grant made by Spain to John Forbes and Company, January 10th, 1818; that the peti-
13 tioners be declared the owners of such parts thereof as had not been disposed of by the United States and that certificates or script be issued to them for the part of said grant disposed of by the United States, according to the sixth section of the act of Congress approved June 26th, 1860.

(6) That there also existed an order of said District Court, made on the 14th day of December, A. D. 1878, allowing the said amendment of the said original petition; and a petition to said court for the issuance of a commission to take the testimony in said cause, and an order of the said court for the issuance of said commission to take testimony, and naming the commission; that said last-named order was dated Decem-

ber 16th, A. D. 1878, and directed that A. Abel, esq., of New Orleans, State of Louisiana, be appointed such commission to take the testimony of the witnesses Henrietta Lynd, Miguel De Eslava, and Manuel Garcia.

Copies of all said original papers are attached hereto and made a part of this petition.

(7) That it appeared by the record and files of said court that the United States had appeared in said cause, but whether or not any answer had been filed therein on behalf of the United States is to petitioners unknown.

(8) That the destruction of the record and files aforesaid, unless supplied, will result in very great damage to your petitioners, persons interested in the said suit.

Your petitioners therefore pray that your honor will consider this their supplemental petition and will set a day for a hearing thereon, and upon the said hearing being had (after due notice to the United States) and the facts set out herein proved to be true, will make and cause to be entered of record in said District Court of the Southern District of Florida an order reciting the substance and effect of said lost records and files and restoring the same.

14 And your petitioners will ever pray, etc.

W. W. DEWHURST,

As attorney for certain of the heirs and legal representatives of John Forbes, John Innerarity, and James Innerarity, copartners composing the firm of John Forbes and Company, the complainants, on behalf of themselves and others interested as or under the complainants or petitioners in said suit.

STATE OF LOUISIANA,
Parish of Orleans.

William H. Wilson, being first duly sworn, says that he is the son of Henrietta Innerarity, the wife of Henry Wilson, now deceased, who was one of the parties complainant in the suit pending the District Court of the United States for the Northern District of Florida on the 23rd day of July, A. D. 1894, entitled, as he is advised, "Dalcour et al. vs. The United States," which was instituted for the confirmation of a grant of land in Florida, made by the lawful authorities of the King of Spain on the 10th day of January, A. D. 1818, to John Forbes and Company; that he is a party interested in said suit by representation and inheritance by his mother, who was a daughter of John Innerarity and one of the complainants in said suit, and also as the representative in the making of this affidavit of others, children of the original complainants in said suit; that he has read the foregoing amended petition and is familiar with the principal facts therein set out, and he knows of his own knowledge of the institution of said suit within the time allowed by law and its pendency undetermined in said court; and he knows of his own knowledge that the substance of the facts therein set out are true; that as to the facts therein stated as to the destruction of the record and files of said District Court of the United States for the Northern District of Florida and the statements therein as to the papers and documents

attached to said original petition he is advised that the statements of said petition are true.

WILLIAM H. WILSON.

Sworn to and subscribed before me this 19th day of January, A. D. 1901.

[Notarial seal.] J. G. EUSTIS, *Notary Public.*

15 (Copy.)

To the honorable the judge of the District Court of the United States for the District of Florida:

The petition of Theodore Dalcour, of Matanzas, in the Island of Cuba; of Augusta Dalcour, of Ellicott Mills, in Maryland; of Sophia Dalcour, the wife of Theodore Sanchez, of Salvador, *of* Cuba, and of said Sanchez, as her husband; of Theresa Dalcour, the wife of Eugene B. Oliver, of Lafayette Parish, in Louisiana, and of said Eugene B. Oliver as her husband; all of whom are the children of Sophia or Susan Forbes, deceased;

And of Stephen Tennant and of Henrietta Tennant, of Lancashire, in England; of Leocadie Tennant, of Liverpool, in England; of Blanche Tennant, the wife of Robert Bruce, and of said Robert Bruce, of Scotland, and of Jules Fontena, of Bayonne, in France; all children of Cammille Dalcour, the daughter of Susan Forbes;

And of Edward Depestre and of Louisa Depestre, of the island of Cuba, and of Jule Depestre, the wife of Jose M. Gonser, of London, England, and of her husband, Jose M. Gonser.

Against the United States of America, respectfully shows,

That they each and all are descendants of John Forbes, who died at Matanzas, in the island of Cuba, in the year 1823, and that they are the only heirs of his body as appears from the following statement of facts and the affidavot annexed and marked (E), it being impossible to obtain information or evidence in regard thereto in Florida.

That John Forbes died at an advanced age in the year 1823, at Matanzas, in Cuba, leaving as his only heirs at law as well as his universal legatees by will his two daughters, then his only descendants, they were named or called by the English or Spanish, the family using both languages, Sophia or Susan Forbes, Junata, Juana, or Jane Forbes, being only heirs at law and universal legatees.

That these two daughters were recognized both as his legitimate and only heirs at law and universal legatees by the proper courts of Spain in Cuba, where they lived with their father at the period of
16 his death, and as such were placed in immediate possession of all property left by him in any of the Spanish dominions.

That Sophia or Susan Forbes married Francisco Dalcour. (Both are long since dead.)

They left surviving as only heirs five children, Cammilla Dalcour, since dead, leaving heirs stated below; Theodore Dalcour, Auguste Dalcour, Sophia Dalcour, and Theresa Dalcour. These four children of Sophia or Susan Forbes are now living and are parties to this proceeding.

That these five children of Sophia or Susan Dalcour inherited each one-fifth of one-half (or one-tenth of all the estate left by John Forbes), including Cammilla among them.

That Camilla Dalcour married Stephen Tennant, who died leaving of that marriage four children only, all of whom are now living and parties herein. She then married Jules Fontena, by whom she had one child only, Jules Fontena, junior, and afterwards she died. The children of Camilla Dalcour, are Stephen Tennant and Henrietta Tennant, of Lancashire, England; Blanche Tennant, wife of Robert Bruce, of Scotland; Leocadie Tennant, of Liverpool, England, born of her first marriage, and Jules Fontena, born of her second marriage.

That the five children of Camilla Dalcour inherit in equal shares and are entitled to have 1/5 of 1/5 of 1/2 of all the estate of John Forbes.

That Juniata, Juana, or Jane Forbes (the wife of Edmond Depestre, formerly of Cuba) is long since dead. She left three children surviving her, who are her only heirs at law. They are Edmond Depestre, Julia Depestre, the wife of Jose M. Gonser, and Louis Depestre, each of whom is entitled to the third of their mother's estate, or 1/3 of 1/2 of all the estate of John Forbes.

That you petitioners hereinbefore named (complainants and plaintiffs in this action) are the only heirs at law of John Forbes, and of his two daughters who are named above, and as such they are entitled by law to claim and have immediate possession of all property left by him at his death.

16½ That John Forbes died as stated in the year 1823, then owning, possessing, actually and legally and equitably, large bodies of valuable lands in Florida, no part of which has at any time come into the actual corporal possession of his heirs, nor has any part thereof at any time been disposed of by them or with their consent, actual or presumed or legally assumed and adjudged to be right.

That John Forbes owned a large body of land west of the Apalachicola in Florida, containing about one million eight hundred and fifty thousand acres, which in the grant (written in Spanish) is described substantially thus:

Commencing opposite to the mouth of the Sweet Water Creek on the Apalachicola River the line runs due west as far as the river Choctawhatchee, when it follows the course of said river to its mouth in the Bay of St. Rosa, then runs eastwardly along the shores of said bay and the sea (meaning the Gulf of Mexico) to the mouth of the Apalachicola River, and up said river to the place of commencement, being all the land between the Apalatchicola River and the Choctawhatchee lying south of the township line dividing township one north from township two north, and containing the lands described on the United States survey as follows:

Township one north, ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17 west.

One south, ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 west.

Two south, ranges 8 to 20 (inclusive) west.

Three south, ranges 8 to 17 (incl.) west.

Four south, ranges 9 15, incl., west.

Five south, ranges 8 to 14 (incl.) west.

6 south, ranges 8 12, incl., west.

7 south, ranges 8 11, incl., west.

17 Eight south, ranges 8 12, incl., west.
Nine south, ranges 7 11, incl., west.

All of which will be more clearly understood by examining the map of said tract of land annexed to this petition or bill, showing its boundaries and the description of every part of it by the United States surveys of the same body of land, which includes within its limits the whole Bay of St. Andrews and its basins, branches, or arms, or it gives an exact description of the lands as they are known on the United States surveys and also the Spanish description in the grant.

That on the fifth of January, 1818 (that is, before the 24th day of July, 1818), at a time prior to the first intimation given to the U. S. that Spain was then willing to treat with the U. S. in regard to the cession of Florida, and when the Island of Cuba and East and West Florida belonged to Spain, and in fact was in her possession and was under the immediate control of Cienfuegos (the captain-general of Cuba), John Forbes, after trying and failing to obtain money from the Spanish or Cuban treasury to pay $100,000 indemnity to him, and failing because the treasury had no money, applied to the captain-general, by petition, for a grant of land described as above to be taken as indemnity for his losses; we would say repayment.

That upon receipt of this petition Cienfuegos, the captain-general of Cuba, had the petition referred to the assessor general and his legal advisor for advice, and upon a favorable report from them, and not sooner, made on the 10th day of January, 1818, he on that day made a formal grant to John Forbes of the land, described (in Spanish) substantially as translated above, had the same signed, made of record and deposited among the Government records.

The original grant being required to remain as a public notarial act, a copy, however, having the force of the original. See the copy reported to the secretary of state by the land commissioners for the Territory of Florida, IV Volume of American State Papers on Lands, pp. 95, etc.

18 That an appropriate copy of this grant was sent from the captain general of Cuba to Don Jose Massot, the governor of the province of West Florida, who, on the 23rd day of January, 1818, put John Forbes into actual possession of the lands described as above, when the grant to Forbes became complete, and he, John Forbes, and not the government of Florida, Cuba, or Spain, was in actual possession of the property, after which he was not at any time interrupted, but he had possession at the date of the treaty and on the day of delivery, etc., and although the state of his own health prevented any personal holding of the land his agents did possess it, as appears by proof of their acts before the courts of Florida given to the commissioners and reported by them as facts, which possession continued as a fact until John Forbes died. No one disturbed him.

Your petitioner now reiterating or summing up say that this grant was made by the captain-general of Cuba and East and West Florida, then the highest officer of Spain in America (or indeed anywhere), whose authority has been repeatedly acknowledged by the Supreme Court of the United States, and is judicially known without proof to any court of Florida or of the U. S. in Florida even if no proof thereof be offered or made. Whatever law once prevailed in Cuba is your own law. It was

made after fully taking advice from all proper subordinate officers, it was made for the sum of $100,000, claimed by Forbes to be due to him from the public treasury of Spain, Florida, and Cuba, and was received by Forbes as full payment of the claim for $100,000, both proved and admitted to be due to John Forbes, a sum so large that the whole of the grant then or at any subsequent time if sold in block or in detail would not bring that amount.

Your petitioners further show that each fact stated above except their own inheritance from John Forbes was shown, proved, or ascertained by the report of Samuel R. Overton, Jos. M. White, and Craven P. Luckett, commissioners for examining and ascertaining claims and titles to
19 land within the districts of East and West Florida, dated at Pensacola, Nov. 12, 1824, and transmitted to Congress of the U. S. Feb. 21st, 1825, printed by order of the Senate of the U. S. in the American State Papers Public Lands, Vol. IV, pp. 94–96, proving not only the possession of these lands given by Governor Massot in obedience to order, but that the agents of Forbes used the courts of Spain to protect that possession so long as they had power. It was acted upon by their court.

That by the law from which we derived the right to bring this action the facts ascertained by this report must be received by the court as proved, from which the assertions we have made appear fully and completely proved. These facts we now ask to restate in a more general manner.

That John Forbes did present to and urge against the Spanish Govt. his claim for very large sums of money, which claim for over $100,000 the captain-general admitted to be binding, but which the royal treasury was then totally unable to pay in money.

That under this state of fact John Forbes asked for the captain-general of Cuba a grant for the lands which we now claim to own, to be received by him as a full indemnity or payment for the losses he had sustained. (Indemnity for which he claimed from the Government.)

That the captain-general of Cuba, unwilling to trust his own judgment, submitted the matter to the legal adviser of his Govt., and after receiving this advice the grant was made and was received by John Forbes as payment in full of the indemnity which the Government was bound to make to him for the losses he proved he had suffered.

That the original grant, like all notarial acts in France, Spain, or Louisiana, is a part of and remains a public record A duplicate copy was sent at once to Governor Massot, the Spanish governor of West Florida, who obeyed it as the legal order of his own superior in office, without either delay or question placed the agents of John Forbes in the actual possession of the property we claim. Not only did he give possession then, but maintained such possession by removing intruders up to the delivery of the sovereignty of the provinces to the United States, and John Forbes retained a civil possession until he died in 1823.
20 That this possession Forbes held by his agents until after the change of government (the state of his own health first compelling his removal from his stone house near St. Marks to Cuba, and making it impossible to superintend the property personally). That the possession and title of John Forbes was specially protected by the 8th

article of the treaty of cession the Spanish (the language of the grantor) reads, "All grants of land made on or before the 24th day of January, 1818, quedaran ratificados, y reconcidas al la personas que esten in possession de ellas (or are confirmed to the persons in possession of them).

Your petitioners show that the commissioners' report referred to does find that Forbes was in actual possession and actually used the courts of the province (p. 96) and its officers to prevent trespassers on these lands up to the formal delivery of the U. S., and he had said possession as a cripple (unable to reach the lands he owns) can have, up until he died on 1823. His agents were always there.

That after his death his daughters, young and inexperienced, knowing nothing of the business of their father and little of his rights, were unable to continue the prosecution of the rights he had already proved; or really they knew nothing about it, and therefore when the report of Feb., 1825, was before Congress, they did not furnish proof of the powers of the captain-general of Cuba, but permitted their rights to slumber as he had left them, probably or almost certainly never hearing of the report on the claim of their father which they had inherited, provoked by the executors of John Forbes, who in another matter had been dismissed from court (such matters pertaining to his heirs).

That this grant thus made by the highest officer of Spain in America, a governor-general (governor of governors), made for a consideration much more than twice, or even ten times, its value, made after consultation with the assessor-general and his legal adviser, was transmitted simply as an order to a subordinate, himself possessing almost regal authority, and was instantly (without question as to his correctness or legality) obeyed as the order of a superior given in a matter wherein he had the right to order and not merely to advise.

The act thus done was acknowledged by the King of Spain and his officers up to the delivery, and is covered specially by the article
21 of the treaty binding the U. S. to respect, acknowledge, and protect the titles made by the proper officers of Spain.

Her own records and the acts of her courts in maintaining the possession of Forbes showing conclusively that the courts of Spain considered her bound to protect this title made to Forbes.

That under these circumstances the U. S. is bound in equity and in law and by every principle of honor regarded as binding among men to make good the claim of these heirs, and to protect it, and not to destroy it altogether by a further delay, and it was solely to fulfill such obligations that the act of Congress under which we act was passed.

That according to the surveys of the U. S. made and returned through the proper department there are 1,375,637.32/100 acres of land within said boundaries surveyed and reported as capable of ownership; besides this there is the shallow basin or bay known as St. Andrews Bay and its branches, every part of which is granted to John Forbes.

That by sale, preemption, grants, donations, or in some other manner the U. S. have disposed of and cannot now give back 904,462.46/100 acres of the land, and (they claim the bay of St. Andrews).

That there remains in kind unsold and not disposed of in any manner 471,174.86/100 acres of land, and besides the soil of St. Andrews Bay and its branches, which are unsurveyed (about 400,000 acres).

Ex. A. That a document marked "A" filed with this bill as an exhibit contains a summary statement of the quantities of land in each township; also what has been disposed of and what remains. This statement is made up by their counsel from other certificates also annexed, but does not contain the area of St. Andrews Bay in any of its calculations.

Ex. B. Your petitioners further show that document B, containing 14 sheets made out by the register or the land officer at Gainesville, gives a minute statement as to every part of the property so claimed, what its whole area was, what has been disposed of by the Govt., and what remains in kind, which document, certified by the register, we annex as Exhibit B.

That the whole amount of this land which the U. S. Govt. (as
22 shown by certificates) have placed out of their power and beyond their control is 904,462.46 100 acres, for which your petitioner' are entitled to have and receive land script in small bodies to be located at their pleasure or that of their holders according to law.

That we are entitled to have and recover besides this the 471,174.86 acres remaining in kind under the control of the Govt. now in their possession.

That besides this we are entitled to the ownership of the soil of St. Antrews Bay, our grant including by its terms every particle of its shores on every side, and the Gulf coast for many miles on both sides of its narrow, shallow, unnavigable entrance.

Your petitioners also annex hereto a map of the land for which we now sue, made by the surveyor-general of Florida, from one compiled for the use of the State's surveyor-general's office and duly certified by him, from which the reasoning herein presented will be more apparent.

Your petitioners further annex the report of Sam'l R. Overton, Jos. M. White, and C. P. Luckett, U. S. commissioners on land titles in Florida, being report No. 2 of the report of said commissioners, communicated to the House of Representatives on the 21st Feb., 1825, printed by the authority of the Senate as the Am. State Papers p, L, Vol. IV, pp. 94–96, which are made evidence by the acts of Congress. This book we now deposit in court as evidence as an exhibit to remain here on file as a record of court and to serve as exhibit herein.

Your petitioners further show that before this report was made by said commissioners, John Forbes had died (1823). His death was not known to the commissioners, nor were the facts now stated known to the children of John Forbes.

That the daughters of John Forbes, and since their death the grandchildren and descendants of John Forbes, did not know of the facts which entitled them to this land, because all original evidence connected with the transactions were in the hands of counsel in a foreign country, or of a notary in a distant city in Cuba. They did not know even how to investigate the matters in which they had an interest, and were not informed of their rights by him.

That under the laws of the U. S. specially provided for cases like
23 the present, they are allowed to sue the U. S. for the lands owned by them to recover judgment for the land remaining in kind, to recover land script for such lands as the Govt. has in any manner disposed of or placed beyond its control, and that service on the district attorney of the U. S. is necessary to bring them into court.

Your petitioners further show that at no time whatever has a report of *of* land commissioners been made adverse to their claim now presented nor any report suggesting fraud, favoritism, or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity, nor has it been acted upon by Congress at any time.

Because at the death of John Forbes in the year 1823, his two daughters were young; they had been long in a country where a different language was spoken, and amongst a people whose counsellors at law and learned men knew little of our laws, and they totally ignorant (even until I told them in reply to their communications) that the treaty of cession ought to preserve their rights.

They did not know what action to take or what possible even then.

That the claim now presented was never rejected by the commissioners referred to, but they merely refused to recommend the claim now presented to Congress for confirmation, because they doubted the power of the captain-general of Cuba to make so large a grant (we ought to say sale) without special authority from the Crown.

Complainants allege that this very question was examined by the captain-general before making the grant. He took advice from proper and legal officers and it was decided, and so the commissioners report.

That the acts of the captain-general of Cuba, after advice, like that of the Secretary of the Interior, after legal advice, are final, at least to their persons.

That the allegations that we have made are each and all proved by reports of facts made by the officers of the U. S., made evidence by law, printed by the U. S. and at their expense, and although not so complete in our favor as the facts might justify, yet amply prove our demands as the report referred to is evidence of the facts.

24 With such facts as we have presented we claim that the 8th article of the cession binds the U. S. to confirm the title of John Forbes to those lands of which we had possession under a title to all respects perfected at the date of the treaty. That the fact that the U. S. pointed out specifically the land titles in Florida which were objected to and canceled by Spain of itself waives all objection to others. (In the treaty they cancelled those claims and so confirmed the others)

Mitchell vs. U. S. 9 Peters That the authority of the captain general of Cuba to make grants of land in Florida, to review, confirm, set aside, or annul grants made by the local governors of Florida, has been repeatedly examined by the courts of Florida and must be known to this court as a part of the law of the land when the cessions are held, and no proof of the laws of Florida as they existed in past time can be required here.

That after the death of John Forbes (before it was known in Florida) his attorneys presented to the proper board of commissioners his claim to two tracts of other land on the headwaters of the little St. Marys River in Florida. Proof was taken by the board and they were severally recommended to Congress for confirmation (see vol. IV, 4 S. ps P-L pp. 221, 262, 283, 464, and 465) being another part of the volume annexed.

That proper surveys had been made of these tracts of land by Don

Geo. F. Clark, a Spanish surveyor (as early as 1814), copies of which which were furnished to the commissioners, and are now found in the office of the surveyor-general, copies of which we now file.

That by the act of Congress the claims of John Forbes and other claims were confirmed to the extent of one league square, the claimant renouncing the surplus. Unwilling to do this the heirs of John Forbes, his two daughters (then being Mrs. Dalcour and Mrs. Depestre), sued for the whole 10,000 acres, obtained a judgment against the Govt. for the whole 10,000 acres, but the Govt. appealed to the Supreme Court of the U. S. when the decree of the Territorial court was reversed and the bill of Mrs. Dalcour and Mrs. Depestre was dismissed because there was no survey definitely or properly locating the land, the survey of Don Geo. F. Clark did not locate the survey definitely or properly and it is now impossible to locate it.

25 That we are entitled to land script for the 10,000 acres to be taken and located in small bodies as the law directs.

That an inspection of the maps filed herewith obtained from the surveyor-general from an old Spanish survey in his office will show that a location at this day is utterly impossible, as the corners are all pines, were marked in 1814 and ever since then in a wilderness—no witness can possibly exist to point to a single corner from memory—no natural object is referred to but swamps and sloughs, which are not distinguishable. Wherefore under the late law they are entitled to script to be located in small bodies at their pleasure.

By the late laws this is provided for.

Ex. D. They annex a copy of the decrees in their favor made by the Territorial court and refer to the case of Forbes vs. U. S. 15 Peters.

Wherefore your petitioners pray that the U. S. be cited herein according to law.

That service of citation process or notice be made upon the district attorney of the U. S. for this district.

That such proceedings be had herein as are required by law, equity, and justice, and that after due proceedings they have a judgment against the U. S. as follows:

1st. For the land described in the grant to John Forbes commencing on the Apalachicola River to a point opposite the mouth of the Sweet Water Creek, and bounding on the north by a line running from said point directly west to the Choctawhatchie, down said river to the Bay or Sound of St. Rosa around the coast of said sound and the Gulf of Mexico to the mouth of the Apalachicola, and up said stream to its commencement, including within it the whole of the waters of the Bay of St. Andrews;

That all the titles derived by any persons, corporation, or State for portions of this body of land be confirmed to them, as against the plaintiffs, but that the plaintiffs have in lieu and stead thereof the same area of land script or warrant to be taken in bodies of not less than 80 acres, and that the plaintiffs now recover from the U. S. land script for nine hundred and four thousand four hundred and sixty-two 41/100

26 acres of land warrants, in bodies as desired by plaintiffs, according to the rules of the land office.

That at a patent issue to them for the land remaining unsold in the townships and their title be affirmed by the Government.

And further that they have judgment for the soil and waters of St. Andrews, being about 400,000 acres of salt water connected with the Gulf by a narrow, shallow inlet, and your petitioners pray a judgment for 10,000 acres of land script for other lands to be taken in bodies of 80 acres or larger, as we may cho'se, to be taken in consideration of the grants of 7,000 acres and 3,000 acres which can not now be located, which script may be located according to law.

Your petitioners pray for general relief and as in duty bound will ever pray.

(Sgd.) ALEX. T. STEELE,
Attorney and Counsellor at Law.

Alexander T. Steele, being duly sworn, says that he is attorney and agent for the parties named in the bill—that no one of the parties is resident of or now in the State of Florida, and that the facts stated except their heirship could not be known to them of their own personal knowledge; that as their agent he has thoroughly investigated every fact stated as fully as it is possible to do, and every assertion made herein including their relationship to John Forbes, is true, as stated, and using his knowledge, as individual and as a lawyer he has not the smallest doubt, they are entitled to the relief asked by them.

Sworn to and subscribed this the third day of March, A. D. 1875.

(Sd.) CHAS. F. FOSTER,
Clerk of the U. S. Dist. Court, Nor. Dist. of Fla.
By L. P. MYERS, *D. C.*

27 (Copy.)

In the District Court of the United States for the Northern District of Florida.

Amended Petition.

Theodore Dalcour, of Matanzas, in the island of Cuba, August or Augustin Dalcour, of Ellicott City, Maryland, Sophia Dalcour, the wife of Theodore Sanchez, of Salvador, Cuba, and Sanchez, as her husband, Theresa Dalcour, the wife of Eugene B. Olivier, of Lafayette Parish, in Louisiana, and said Eugene B. Olivier, as her husband, all of whom are the children of Sophia or Susan Forbes, deceased;

And Stephen Tennant and Henrietta Tennant, of Lancashire, in England, Leocadie Tennant, of Liverpool, in England, Blanch Tennant, the wife of Robert Bruce, and said Robert Bruce, of Scotland, and Jules Fontena, of Batonne, in France, all children of Camille Dalcour, the daughter of Sophia or Susan Forbes;

And Edward Depestre and Louisa Depestre, in the island of Cuba, and Julie Depestre, the wife of Jose M. Gonser, of London, England, and her husband, Jose M. Gonser, being the descendants and heirs at law of John Forbes, deceased, and the following named parties being the descendants and heirs at law of James Innerarity, deceased, or the husbands or representatives of such heirs, to wit:

Fanny W. J. Innerarity, Tutrix of Helen V, and Louis Minor Innerarity, Emanuel S. Innerarity, Margaret Innerarity, James I. Innerarity,

all of the city of New Orleans, Louisiana; Fanny C. Innerarity, wife of Cornelius P. Wykoff, and said Wykoff, as her husband, Eloisa Innerarity, wife of John Wilson, and the said Wilson as her husband, also of New Orleans, Louisiana; Albert H. W. Innerarity, of Scott Station, Mississippi, Elisa Z. Innerarity, wife of R. N. Boggs, residing near Pass Christian, Mississippi, and said Boggs as her agent; Eliza Innerarity, widow of Louis Minor, residing in the city of Norfolk, Virginia; James or Santiago Innerarity, residing at Haidaye, France, Harriet F.
28 Innerarity, wife of E. L. Breton Deschapelles, and the said Deschapelles as her husband, Eliza Melaine Innerarity, wife of John S. Barton, and the said Barton as her husband, residing in New Orleans, Louisiana;

And the following named parties the descendants and heirs at law of John Innerarity or the husband as representative of such heirs, to wit:

Victoire Innerarity, widow of W. P. Innerarity, Henrietta Innerarity, widow of Henry Wilson, both of New Orleans, Louisiana, Albert P. Hulse, residing at Bay St. Louis, Mississippi, Sarah Hulse tutrix of her minor children, viz:

John and Victoire Hulse, residing at Milton, Florida, and Emma Hulse, wife of L. B. Taylor, residing at Pensacola, Florida,

vs.

The United States of America.

The above-named petitioners come and file the foregoing amendments to the original petition herein by adding the following sentences which are to be included therein and inserted immediately before the prayer thereof and made a part of said petition except so far as they are inconsistant therewith and by superseding said prayer by the one hereinafter contained.

(1) Petitioners aver that it was by mistake and error that the grant of land first set up and described in the original petition was described and stated to be a grant to John Forbes, and they now aver that said grant was made to John Forbes and Company, a commercial partnership existing at the date of said grant.

(2) That at the date of said grant said partnership was composed of John Forbes, who was the principal partner, of James Innerarity and John Innerarity.

29 (3) That in the absence of any knowledge on their part and of any evidence to the contrary, the petitioners aver and admit that the interests of each of said three parties in said grant was one undivided third.

(4) That the petitioners named in this amended petition as the descendants of said Forbes are entitled to one-third in said grant, they being his descendants and true heirs; that the petitioners mentioned in said amended petition as the descendants of James Innerarity are the true heirs of said James Innerarity and are entitled to one-third interest in said grant to John Forbes and Company.

That the petitioners mentioned in this amended petition as the descendants of John Innerarity are the true heirs of said John Innerarity and are entitled to one-third interest in the said grant to John Forbes and Company.

(5) That the petitioners one and all renounce and withdraw all claim

founded upon and arising out of any other or different grant or grants mentioned in the original petition; that is to say, they renounce all claim upon any grant therein mentioned, except upon the grant therein first mentioned, made January 10th, 1818, and described in Vol. IV, State Papers, Public Lands, pages 94–95 and 96.

(6) That the lands so granted as aforesaid January 10th, 1818, have not been and were not in possession of or cultivated by the original claimants John Forbes and Company, or any of said partners of said firm, or those holding title under them, or any of them, for a period of so much as twenty years prior to the commencement of this suit or proceeding, and have not been since in the possession of or cultivated by said firm or any of the said partners or by anyone holding title under them or any of them.

30 Wherefore your petitioners pray that whereas the United States have already appeared in this suit the title of your petitioners may be declared valid and binding upon the United States to and for the lands described in the aforesaid grant of January 10th, 1818, to wit:

The land situated in the present State of Florida and bounded and described as follows:

Commencing on the Apalachicola River at a point opposite the mouth of Sweet Water Creek and bounded on the north by a line running from said point directly west to the Choctawhatchee, down said river to the Bay or Sound of St. Rosa, around the coast of said sound and the Gulf of Mexico to the mouth of the Apalachicola and up said stream to the point of commencement, including the whole of the waters of the Bay of St. Andrews;

That the above-named petitioners may be declared the lawful owners as heirs of John Forbes, James Innerarity, and John Innerarity such parts of said above-described land as have not been disposed of by the United States after the same shall have been ascertained by proper evidence, they pray that land script or certificates of location may be awarded to them to the extent of the claim and land interferred with according to the sixth section of the act of Congress of June 22nd, 1860, to be located upon any lands of the United States subject to private entry at one dollar and twenty-five cents per acre, and your petitioners pray for such general relief and equity as they may be found and held entitled to.

L. D. OLIVIER.
EUG. B. OLIVIER.

31 STATE OF LOUISIANA,
Parish of Iberia:

Theresa Dalcour, wife of Eugene B. Olivier, by me being sworn, says that she is one of the plaintiffs in the above-entitled cause; that she has read the foregoing amended petition and knows the contents thereof, and that the statements contained in the same are true to the best of her knowledge and belief.

Sworn to and subscribed to before me at New Iberia, Louisiana, this 24th day of October, 1878.

[L. S.]

W. D. MERCHANT,
U. S. Com'r, Dist. of La.

WM. ARCHER COOKE,
Solicitor and Counsel for Petitioners.

(Endorsed on the back:) No. 4. U. S. Dist. Court, Northern District of Fla. Forbes Heirs vs. U. S. Amendments to the petition. Filed Dec. 14th, 1878. P. Walter, clerk.

32 (Copy.)

SATURDAY MORNING, *December 14th, 1878.*

Court met pursuant to adjournment.
Present, Hon. Thomas Settle, judge.
Court was opened in due form by the crier.

THEODORE DALCOUR ET AL., *vs.* THE UNITED STATES. } In equity. December term, 1878.

On reading and filing the petition of the plaintiff herein praying that the heirs of James and John Innerarity may be made parties complainant to this bill, and also that the *the* original petition may be so amended that it may alleg'e that the grant therein set forth was a grant to John Forbes and Company, and that James and John Innerarity were partners of said John Forbes.

Ordered that said prayer of said petitioners be granted subject, however, to the right of the United States to file such exceptions to this action as it may be advised.

Also reserving the right to all other persons interested in this litigation to take such exceptions as they may be advised and saving to the United States all rights and exceptions which may arise under the stat. of lims.

(Sd.) THOMAS SETTLE, *Judge.*

33 (Copy.)

MONDAY MORNING, *Dec. 16th, 1878.*

THEODORE DALCOUR ET AL. *vs.* THE UNITED STATES. } In equity.

On reading and filing the affiavits of S. D. Olvery and E. N. Olvery stating that Henrietta Lynd, Miguel de Eslava, and Manuel Garcia are material witnesses on behalf of the complainants, and that they are aged, feeble, and infirm, and reside more than 300 miles from the jurisdiction of this court, and if their testimony is not taken there is danger that they may die or become unable to testify;

Now, therefore, on motion of William Archer Cocke, esq., sol'r for complainant,

Ordered that a com'n do issue out of the office of the clerk of this court to A. Abet, esq., of the city of New Orleans, State of Louisiana, empowering him to take the depositions of the said witnesses, de bene esse, under the rules of the court on giving 30 days' notice to J. B. Stickney, esq., U. S. atty., of the time and place of taking such depositions.

(sd.) THOMAS SETTLE, *Judge.*

34 (Copy.)

United States District Court, Northern District of Florida, sitting at Tallahassee, Florida.

HEIRS OF JOHN FORBES
vs.
THE UNITED STATES.

To the honorable the judges of the District Court of the United States, sitting in and for the Northern District of Florida at Tallahassee:

The petition of intervention of Santiago Innerarity, residing at Bayonne, in France, son and heir of James Innerarity, of Virginia Minor, a widow, a daughter and heir of James Innerarity, residing at Norfolk, Virginia; of Eliza J. Innerarity, wife of Robert N. Boggs, and Robert N. Boggs as her husband; of Albert H. Innerarity, of the State of Mississippi, son and heir of James Innerarity; of Eliza Innerarity, wife of John Wilson, of New Orleans, and of John Wilson as her husband; of Henrietta Innerarity, wife of E. Le Breton, of New Orleans, of E. Le Breton as her husband; of Fanny E. Innerarity, wife of Cornelius C. Wykoff, of Cornelius C. Wykoff, of New Orleans; of Fanny W. Johnson, widow of John F. Innerarity, son of James Innerarity, acting as tutrix of her minor children, heirs of John F. Innerarity, and through him, of James Innerarity, his father, which minors are named Louis Minor and Helena Innerarity; of Emanuel S. Innerarity, of Margaret Isabel Innerarity; and of James Innerarity, children of James Innerarity, the partner of the firm of John Forbes and Co.; of J. A. P. Hulse, grandson and heir of John Innerarity; of Victoire Innerarity, widow of Henry Wilson, of New Orleans, children and heirs Innerarity, who all join herein and sue for their own benefit and also for the benefit of any descendant of John and James Innerarity who may not be mentioned or may not join herein, and for the relief they ask respectfully show:

35 That the grant of land between the Apalachicola and the Choctawhatchee for which the heirs of John Forbes have sued was made to John Forbes and Co., was made for the debts or indemnity due to John Forbes and Co., and although the legal title was in John Forbes the consideration was furnished by John Forbes and Co.; or, in other words, the grant was made to John Forbes and Co., without mentioning their names separately, to pay a debt due them by the Government.

That the legal title by the laws of Spain was in John Forbes alone, but he was equitably and morally bound to share this land with John and James Innerarity, according to their interest in the partnership of John Forbes and Co.

That John Forbes owned 2/3ds of the capital of the partnership and John and James Innerarity owned each one-sixth, or one-third for the two.

They show that their right is equitable, but they are assured that the heirs of John Forbes, whenever it is possible, will make their equitable title fully legal.

They ask to be permitted to intervene and that their equitable right be acknowledged by the court as heirs of John Innerarity and James Innerarity, leaving a settlement of their rights among themselves to be made by themselves.

They ask that a judgment be rendered in favor of complainants for the whole amount which they claim, merely recognizing the right of intervenors for an account for one-third from them.

They ask for equitable relief, joining in complainants' prayer.

(sd.) ALEXANDER T. STTELE,
Attorney.

(Endorsed on back:) "(Copy.) Supplementary petition in re. Forbes Heirs vs. U. S. Presented Feb. 11–1876. Denied."

36 The report of the United States commissioners for determination of land titles in Florida, being report No. 2, printed in vol. 4, pp. 94–96, of the American State Papers, is stated, in the original petition sought to be restored, to have been deposited in court.

If the volume was actually deposited, counsel for petitioners will not encumber the files with a copy of this printed volume except upon the order of the court, but will ask leave of the court to file with this petition a copy of the report upon the claim of John Forbes and Co., being report No. 2, pages 94–96 of said volume.

W. W. DEWHURST,
Attorney for Petitioners.

The copy of the list of lands within the bounds of the grant to John Forbes and Company, certified to by J. Lee, register of the United States land office at Gainesville, being a bulky document, is attached to this amended petition by a cord for convenience.

W. W. DEWHURST,
Attorney for Petitioners.

(Indorsed on the inside of the cover of the foregoing is the following:) "On the 26th day of January, A. D. 1901, I served a copy of the within petition and attached documents (except only the map attached), in the suit of Dalcour et al. vs. The United States, upon Hon. J. N. Stripling, United States attorney for the Southern District of Florida, by leaving the same during office hours in his office, in the city of Jacksonville, with I. A. Zacharias, asst. U. S. district attorney, an employee in said office. John F. Horr, U. S. marshal. By Percy C. Stickney, chf. O. deputy."

37 (Endorsed on back of cover:) "District Court of the United States, Southern District of Florida. Dalcour et al. vs. The United States. Amended petition for restoration of record. Filed Jan. 26, 1901. E. O. Locke, clerk. W. W. Dewhurst, atty. for petitioners."

38 [From District Court Minute Book, "C," pg. 281. Southern District of Florida.]

Regular term, U. S. District Court, So. District of Florida, January 15th, 1901. Tuesday.

Present, Honorable James W. Locke, judge, the officers, crier, and bailiffs.

Ordered, that court *court* be opened.

Whereupon court is opened by due proclamation.

* * * * * * *

THEODORE DALCOUR ET AL.
vs.
UNITED STATES OF AMERICA.

Now comes the plaintiff and moves for leave to amend his petition, which said motion is granted. Also order is entered herein allowing the opening of the depositions returned from Canada. (See D. C. O. B.)

* * * * * * *

Attest:

E. O. LOCKE, *Clerk.*

38½ [From the minutes of the District Court of the United States for the Southern District of Florida, held at Jacksonville, in said district, on Thursday, February 7th, 1901.]

* * * * * * *

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES. } Petition for restoration.

Now comes petitioners herein by their attorneys and move the court for leave to amend the amended petition, which said motion being argued by the respective counsel is submitted, and upon consideration thereof the following order is made, viz:

Ordered, that the within motion be granted and the written stated amendment to the petition herein filed made.

Ordered, that court adjourn till the 8th inst., at which time the officers and bailiffs shall attend.

And court is adjourned as ordered.

Attest:

E. O. LOCKE, *Clerk.*

Page 295, Minute Book "C."

39 [Extract from minutes.]

Adjourned term U. S. District Court, So. District of Florida.

FEBRUARY 9TH, 1901.

Present, Hon. James W. Locke, judge:

* * * * * * *

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES. } Petition for restoration.

This cause being presented by attorney for petitioners for hearing on motion for restoration of lost records, upon the testimony of witnesses, the hearing is objected to by the attorney for the United States upon the grounds of not having sufficient notice; which said objection is overruled and the testimony of E. O. Locke, Philip Walter, P. C. Stickney, Mrs. Janin, and Mr. McCabe is taken, who are duly sworn and testify in behalf of the plaintiff.

And the matter is argued and submitted.

* * * * * * *

From page 295, Minutes U. S. Dist. Court. So. Dist. Fla. Vol. "C."

* * * * * * *

The testimony and proceedings are as follows:

40 [Testimony.]

In the United States Court, Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

JACKSONVILLE, FLA., *Feb'y 9th, 1901.*

Before Hon. J. W. Locke, U. S. District Court Judge.

Mr. DEWHURST. I have left out one name, which I would like to interline—the name of William H. Wilson, of New Orleans.

(Permission was granted by the court.)

E. O. Locke produced as a witness on behalf of petitioners.

Mr. STRIPLING. We object to the proceedings to take testimony at this stage of the proceeding upon the grounds:

1st. There has been no proceeding pending in this court to re-establish these papers until the 7th inst., of which the United States were compelled to take notice; as we contend the suit was instituted on the 7th inst.

2nd. Upon the ground that we have not had the notice required by the Revised Statutes in such case.

3rd. The papers and exhibits now on file with the so-called amended petition are voluminous and badly written, so that it has been impossible for me to make a thorough investigation of the merits of the case, and I am not in a position to proceed intelligently. By an examination of these records your honor will see there are a number of papers filed as exhibits which are difficult to read. There is no issue before the court. We are not in position to deny whether such suit was in existance, or whether any papers ever existed, and in the investigation now proceeding we are at a great disadvantage, because we are not in position to properly examine the witnesses.

41 I call your honor's attention to the fact the original petition in this case did not entitle the petitioner to the relief they now demand; the court could not have made any order on that petition, even assuming it was in the name of the correct parties; the allegations were too vague and meagre to enable the court to make any order at all. Subsequently Mr. Dewhurst has filed an amended petition, which is fuller than the original on' in general form, in which all these exhibits are presented, but even in the form of his amended petition the Government are not compelled to take notice of it, because the court could not make any order on it. And we have now only had less than two days in which to examine these records. And admitting as a matter of courtesy, I might have gone on and examined this from time to time, I was not required to do it, and we would like to have a reasonable time in which to familiarize ourselves with this case, in order that we may intelligently cross-examine any witnesses that are brought.

Mr. DEWHURST. As the stenographer is taking this testimony for preservation, I ask that he be sworn.

By the COURT. They have been before the court in some shape or other for some time.

Mr. STRIPLING. I appear expressly for the purpose of objecting to the jurisdiction.

By the COURT. There is an issue before the court whether or not there was case pending and whether the papers have been destroyed; that is the issue, and the burden is on the petitioner to satisfy the court. The objection is overruled. The Government is not required to take any proceedings—the party comes in and the Government has had notice; the burden of proof is on the petitioner and he has to make his case; only the district attorney having notice of it can take part as he sees fit. The refusal of the Government in this proceeding does not prevent the petitioner from proceeding. There is no objection on the ground of the Government not having notice.

42 Mr. STRIPLING. Yes; not had notice required by the statute.

By the COURT. We will proceed, subject to any questions of law which may hereafter come up.

Mr. STRIPLING. I did not know any witnesses would be brought here, until I was advised of the fact by Mr. Dewhurst in open court, and the witnesses present.

Mr. DEWHURST. The principal witness in the case, Mr. McCabe, was brought because of the objections of the district attorney, the interrogatories were not sufficiently definite for him to cross; brought here simply to meet his objections.

The stenographer, H. H. Brown, esq., was then duly sworn to truthfully transcribe the testimony.

E. O. LOCKE, being duly sworn, testifies as follows:

Direct examination by Mr. DEWHURST:

Q. Will you please state your official position in connection with this court?

A. I am clerk of the U. S. Circuit and District Courts.

Q. How long have you been clerk for the Southern District of Florida?

A. Since 1872.

Q. How long have you been such clerk in Jacksonville?

A. August, 1894.

Q. Have you been such clerk successively since the change of the judicial boundaries of the Southern District of Florida—since the act of July, 1894?

A. I have.

Q. Please state whether or not you have made search among the records and files of the District Court of the United States for the Southern District of Florida, to ascertain whether or not there exists among those records the files in the suit of Dalcour et al. against The United States.

A. I have made such search.

Q. State the result of your search.

43 A. Find nothing in the files and on the records.

Q. Will you state the earliest files you find in Jacksonville on the records of the Southern District?

A. It was some time in 1891—I think the last. I will say there are some miscellaneous papers—a few scattered papers here antedating that time—which were saved, not being in the clerk's office perhaps at the time of the fire; but the general bulk of the papers only go back to 1891.

Q. What fire do you speak of?

A. I have no personal knowledge of it.

Q. What fire do you refer to?

A. The fire which destroyed the building in which the U. S. clerk's office was situated in the Mohawk Block.

No cross-examination.

PHILIP WALTER, produced as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

Direct examination by Mr. DEWHURST:

Q. State your name.

A. Philip Walter.

Q. What connection have you now or did you have with the District Court of the United States for the Northern District of Florida?

A. I was clerk of the District and Circuit Courts for the Northern District at Jacksonville from 1874 to 1894—about the 1st of August, 1894.

Q. As clerk of the U. S. District Court of Florida for the Northern District of Florida, did you have any connection with a suit entitled Dalcour, or Theodore Dalcour et al., against The United States of America?

A. The only connection I had with it was to file the papers as clerk.

Q. Have you any recollection of filing papers in the case in that court?

A. I do.

Q. Can you recall the character of any of the papers which you filed in that case?

44 A. Yes; I filed a petition and some schedules of land and a copy of the State Papers.

Q. Can you recall whether any of the papers were filed in the case by any other clerk of that court, at any other point besides Jacksonville?

A. Some of them were filed at Tallahassee by Mr. Foster, who was at one time clerk there. I think I filed some there also before Mr. Foster was clerk. He succeeded me at Tallahassee when I came to Jacksonville. I once also filed some papers at Pensacola brought over by one of the attorneys from New Orleans.

Q. Do you remember an attorney at law by the name of Alexander Steele?

A. Very well; I think he is a man pretty hard of hearing.

Q. Do you remember whether he had any connection with this case *case* of Dalcour et al. against The United States?

A. Yes; he was one of the attorneys at one time; I don't know whether he succeeded some one, or some one succeeded him.

Q. He was an attorney in that case?

A. Yes.

Q. Do you remember Mr. Edward Janin, of Washington?

A. Yes.

Q. Do you remember John B. Stickney?

A. Very well.

Q. Do you know whether he had any connection with the case?

A. No; I don't know, except that he was U. S. district attorney, and I suppose represented the Government; I don't remember it.

Q. To the best of your recollection what was the general character of the papers in the suit of Dalcour et al. against The United States, as to whether they were small papers, folded like this [exhibiting a legal document] or more extended papers?

By the COURT. The best of your recollection.

A. I do recollect there were a number of very large papers, and a great number of small papers; there was an entire box full in that case, kept by itself.

Q. Do you remember whether or not there was a list of lands certified to by J. C. Lee, the registrar of the land office?

45 (Objected to by the district attorney.)

Q. State as near as you can what papers were filed in the case.

A. There was a petition; a copy of the State Papers, and there was some answers; some subpœnas, and some commissions issued; and there was one or two or more lists of land sent up from the U. S. land office—there was loads of papers.

Q. Will you look at this volume, which is a volume of the American State Papers, vol. 4, and see if you can state whether or not the volume that was filed in that case is a similar volume?

A. It is a similar volume, but this is not the one that was filed; it was a little more square, a little wider, and its back was torn off.

Q. But it was vol. 4, of the American State Papers?

A. Yes.

Q. Look at the exhibit, which is the exhibit attached to the testimony of the witness William McCabe——

By the COURT. Inquire first whether he can identify the papers. As to that original petition in the case, can you recall any particulars as to that petition?

A. I think possibly if I saw it I can; I could not say; I think it was 25 years ago it was filed.

Q. Have you any recollection as to the parties named in the petition?

A. I might have if I had the papers, but from recollection I can not say.

Q. Can you recall who brought the petition as attorney?

A. No; I rather think though it was Mr. Steele, but I am not positive about that. I know he was an attorney, and there were others. I don't know but what Mr. McCabe at times was connected with it.

Q. A petition is filed in evidence with Mr. McCabe's——

(Objected to.)

By the WITNESS. I would state my recollection of it. The paper was very much larger than the petition—had a whole lot of exhibits to it, and the whole thing was filed as one original—larger than the piece of paper you had in your hand.

46 Q. And those exhibits were filed, too?

A. Yes.

Q. You have stated that you recollect the making of orders in the case of the issuance of a commission?

A. Yes.

Q. Can you remember whether or not you issued a commission in the case?

A. I did, several commissions, I think; but I can recollect one particular one.

Q. Can you remember to whom you issued it?

A. A gentleman by the name of Abet, a gentleman in New Orleans.

Q. Can you remember the character of any order made in the case?

A. I might remember if I saw the orders, but I had no reason to charge my mind with anything 25 years ago. I made a number of copies of different papers.

Q. Can you remember whether or not Judge Settle, as judge of the court, made any order in the case?

A. Yes; I think Judge Settle ordered that commission to issue. It is a pretty old case; I think it commenced in Judge Frazier's time.

Q. (Witness handed the exhibit attached to the testimony of William McCabe, Exhibit G, purporting to be a copy of the order of Thomas Settle in the case of Theodore Dalcour et al. agst. The United States, ordering the issuance of a commission to Abet, of New Orleans.) Do you remember such an order as that made by Judge Settle?

(Objected to.)

A. I have already said that there was such an order made. I could not state the date of it, the 16th or 17th of Jan'y. I know a similar order was made by Judge Settle, and I did send the commission to New Orleans, and received the testimony back. As to the date of it I can not say.

Q. You have stated that you filed certain petitions in the case; do you remember whether or not you filed an amendment to the original petition in the suit, on or about the month of December, 1878?

47 A. I would state all I can remember about it is, there were probably one or two or three amendments to the original petition filed, but the date or time I know nothing about.

Q. Do you remember an order allowing an amendment made by Judge Settle in the case?

A. I do not remember the order.

Q. Can you state whether or not those papers were in the building used by the U. S. court-house in Jacksonville at the time that building was burned?

A. They were.

Q. Whereabouts in the court-house were they?

A. In the clerk's office right against the wall near the front door, and always kept there in a cedar box, of which the Government had 24 at one time.

Q. How many of those boxes were in the court-house at that time?

A. They were all there, except, I think, two, and I think they are here now somewhere in this court.

Q. Was this suit pending, undetermined at that time?

A. I suppose that is a question of law; that case was there.

Q. Have you any recollection or knowledge of the dismissal or discontinuance of the case?

A. I have not.

Q. Do you know whether Alexander Steele is living?

A. I do not.

Q. Do you know whether Mr. Janin is living?

A. I have heard he is not.
Q. Do you know whether John B. Stickney is living?
A. He died in Washington sometime in the early 80's.
Q. Do you know William Archer Cock?
A. I do.
Q. Do you know whether he had any connection with this suit?
A. It was of record in the case; I think for the plaintiffs.
Q. Do you know whether he is living?
A. He is not.
Q. How long since he died?
A. Several years; died, I think, at Sanford.
48 Q. Can you state approximately the time he has been dead?
A. No.
Q. Is it ten years?
A. I don't think as much as that; I should not think it was over 7 or 8 years; it may be.
Q. Do you remember Mr. Cock's connection with public affairs in '76 in this State?
A. Yes.
Q. How long after that do you think he died?
A. I should think it was a good while after; think he was attorney-general in '76; after that was circuit court judge. I think he was on the bench quite awhile—served 7 years out—and then he practiced law after he went off the bench.

Cross-examination by Mr. STRIPLING:

Q. Please give the style of the cause, as nearly as you can recollect, about *about* which you have testified.
A. Theodore Dalcour and others against The United States.
Q. Do you remember the names of any of the complainants in the suit?
A. Not right now; if you mentioned some of them I probably should.
Q. What was the character of the paper which you say was filed as the original petition?
A. It was a petition with a whole lot of exhibits.
Q. For what purpose?
A. To the best of my recollection it was a suit or petition to have the United States set aside certain land which they claimed.
Q. Did you ever read the petition?
A. I suppose I did when I made copies of it personally.
Q. For whom?
A. I think I made one or two copies for the United States; I made a copy for different parties.
Q. You recollect whether or not any process was issued on that petition?
A. Yes; process was served.
Q. What kind of process was it?
A. There was a notice to the district attorney.
49 Q. What did the notice contain?
A. I don't know; my best recollection is now they would call it up for hearing on a certain day.

Q. Was that notice signed by you or the attorney?
A. Both; I think by the attorney and certified by me as clerk under seal of the court.
Q. When was the suit commenced?
A. I don't recollect; I stated I thought it was commenced in Judge Frazier's time.
Q. Were you clerk under Judge Frazier?
A. I was.
Q. When did Judge Frazer cease to be judge?
A. Sometime in the part of '76 in my impression.
Q. Who succeeded Judge Frazer?
A. Judge Thomas Settle.
Q. Do you remember the last order that was made in that case?
A. No; I don't know which was the last or first.
Q. Were you required during that time to make report to the Washington office of the cases in the United States courts and their condition?
A. No; the district attorney made them.
Q. You never reported the case to the Attorney-General?
A. I suppose I made out a list of the cases pending, but gave no information as what its condition was.
Q. You say there was commission issued to Abet to take testimony; do you remember the names of the witnesses?
A. No; I do not.
Q. Was testimony under that commission taken?
A. Yes.
Q. Was it received by you as clerk?
A. Yes.
Q. The testimony of how many witnesses was taken?
A. I think several—quite a number; my best recollection is quite a number of witnesses.
Q. Was the testimony that was sent back to you voluminous?
A. Rather; my best recollection is about the size of that largest paper.
50 Q. About how many pages of legal cap paper?
A. A couple of hundred, probably; I am only guessing at that.
Q. You use a couple of hundred as an approximation?
A. That is all.
Q. Do you know when the building in which the U. S. court and clerk's office was was destroyed by fire?
A. Either the 18th or 19th of May, 1891.
Q. How long previous to that time had it been since any action was taken in that case?
A. I should think several years.
Q. Nothing had been done for several years in the case?
A. Nothing, to my recollection. It was about ten years ago since the court-house burned.
Q. Were you personally acquainted with any of the plaintiffs in this suit?
A. I can not say unless I saw the names.
Q. Did you know Theodore Dalcour?
A. No, sir. I don't know whether any of the attorneys were plaintiff in the case; I know all of the attorneys, pretty much.

Q. Did you know Elizabeth Innerarity?
A. It seems to me there was one person of that name came to the court, but I am not positive about that now. I recollect very well writing her name in copying the papers.
Q. Did you know John S. Barton?
A. No, sir.
Q. Do you know whether Eliza Innerarity was related to John Barton?
A. I do not.
Q. Did you know Eliza I. Minor?
A. I don't think I do.
Q. Did you know Louis Minor?
A. No, sir.
Q. Did you know Emma Hulse Taylor?
A. No, sir.
Q. Did you know William H. Wilson?
A. Did he live in Orange County?
Mr. DEWHURST, of New Orleans.
51 A. No, sir.
Q. Did you know Le Breton Des Chapelles?
A. No, sir.
Q. Did you know Harriet Des Chapelles?
A. No, sir. I think there was one of those ladies I saw come in the U. S. court, but I could not say which one it was.
Q. You are quite sure a commission issued to a man named Abet at New Orleans, and that he returned the testimony of a number of witnesses?
A. I am sure the commission issued, and that he returned some testimony; how many witnesses I don't recollect.

PERCY C. STICKNEY, called as a witness on behalf of petitoiner, being duly sworn, testifies as follows:

Direct examination by Mr. DEWHURST:

Q. Will you state your name, please?
A. Percy C. Stickney.
Q. Who was your father?
A. John B. Stickney.
Q. Will you please state whether he is living or deceased?
A. He is deceased.
Q. What was the date of his death?
A. He died about October or November, 1882.
Q. What official position did he hold?
A. He was U. S. district attorney for the Northern District of Florida.
Q. Was he the incumbent of that office at the time of his death?
A. Yes, I think he was.
No cross-examination.

PHILIP WALTER recalled.

By Mr. DEWHURST:

Q. In your cross-examination you stated that you recollect the issuance of a commission by you to A. Abet, notary public, New Orleans,

and also the return of that commission here; I ask you whether your recollection of the return of the commission is as distinct as your recollection of the issuance of the commission?

A. No, it is not as distinct. The reason I think I am correct, I believe it was brought over by one of the attorneys from New
52 Orleans and filed.

Q. But upon the matter of the issuance of the commission you are positive?

A. Yes.

Q. On the matter of the return of the commission you may be mistaken?

A. It is 30 years—but I think I am correct.

Mrs. JANIN, produced as a witness on behalf of the petitioner, being duly sworn, testifies as follows:

Direct examination by Mr. DEWHURST:

Q. Will you state your relation to Mr. Edward Edward Janin?

A. I am his wife.

Q. What was his occupation?

A. He was a lawyer and attorney.

Q. Where was his residence?

A. In Washington.

Q. When were you married?

A. In October, 1877.

Q. Is Mr. Janin living?

A. No.

Q. When did he die?

A. May 17th, 1891.

Q. What was the condition of Mr. Janin's health during the latter part of his life?

A. He was paralysed for about seven years of his life.

Q. What effect had that upon your knowledge of his business affairs—in connection with his business affairs, if any?

A. I had to help him a good deal. Mr. Janin was a very unsocial man, and went about but little; he used to talk over his business matters with me a good deal; he did not care for anything but his work.

Q. Will you state whether you acted as amanuensis or clerk for any length of time?

A. I did after his illness; he could not write for some time.

Q. Did you write letters for him?

A. I did.

Q. Did you read his correspondence?

A. Yes.

Q. State whether or not you know of his connection—if he had any connection—with the case of Theodore Dalcour and others against the United States?

A. He was principal attorney in that case. He employed, I
53 think, other people to help—Messrs. Fleming & Daniel.

Q. In what State was that suit?

A. Here in Florida.

Q. Have you any knowledge of what court it was in?

A. I have written a good many papers; I think it was Theodore Dalcour et al., for the Northern District of Florida.

Q. Do you know whether your husband kept a docket of his cases?

A. Yes.

Q. You know whether he made entries from time to time in that docket of cases?

A. Of the progress of cases, yes.

Q. Will show you this book and ask you if this is your husband's book [book shown witness]?

A. Yes.

By the COURT. Been in your custody and keeping ever since?

A. Yes, always.

Mr. DEWHURST:

Q. (On page 156 of this docket an entry is shown the witness.) Is that in the handwriting of your husband?

A. It is.

(Page 156 offered in evidence.)

Q. On page 157 state whether or not that entry is in your husband's handwriting?

A. Yes; it is all in his handwriting.

Q. On page 170, is that in your husband's hand writing?

A. Yes.

Q. On page 225?

A. Yes.

Q. And also the entry which appears 224?

A. Yes.

Q. Do you know of your own knowledge the time at which Mr. Janin became connected with this suit of Dalcour and others against the United States in Florida?

A. After our marriage, and I think it must have been '78 & '79, but I am not sure.

Q. Were you ever in Florida yourself before this?

A. Whenever he traveled I traveled with him, and I came with him twice on this business.

54 Q. Can you recall the earliest time you came to Florida with him on this suit?

A. We came once in August—I remember it was very hot—I think '79, and then I came with him another time, and that was in the winter time. He went over to Tallahassee and stopped at the St. James Hotel, and I think it was after the Chicago fire, but I don't remember.

Q. The second time was after the Chicago fire?

A. It was after the Chicago fire. I did come down in August, '79, and the other I think was—it was winter time. He left me here and went to Tallahassee to file some papers.

Q. In this suit?

A. Yes; he had nothing to do with Florida except in that suit.

Q. Do you remember whether or not on this first visit of August, '79, he filed any papers in this suit?

(Objected to.)

A. I can remember he was in Minnesota on his own private business,

and he got some letters of advice, and he had not intended to come back, and the papers he said was something absolutely necessary to be done; and we came from Duluth and stopped over in Washington to get some papers in connection with this suit, and we came on the 19th of August, 79, from Duluth. I remember because I was very ill, and it was the change of climate. He said it was absolutely necessary for him to come here to arrange about that business.

Q. You stated your husband was paralysed. When was the first shock?

A. In March, 1884

Q. From March, 1884, until May, 1891, when he died, what was his physical condition?

A. He was very feeble. In 1885 he had the third stroke of paralysis—in August, 1885, he had the third stroke from which the doctor said he never would recover, and after that months he was absolutely helpless, and most of the time we lived in hospitals—lived in five hospitals.

Q. Who looked after his business during that period?

A. I did.

55 Q. Did you have correspondence of any kind in regard to this case?

A. Messrs. Fleming and Daniel wrote to him about this business from time to time. He employed them to look after another case in connection with this claim. I always wrote his letters.

Q. You read his letters at that time?

A. Yes.

Q. Did you write his letters at that time?

A. Yes.

Q. Do you remember receiving or writing letters in regard to this case?

A. From time to time. Of course, part of the time he was so ill he could not do anything; he was sick and unconscious for a long time.

Q. Can you state whether there was any considerable number of letters that you wrote in relation to this case during that time?

By the COURT. There was nothing to impress this case any more than the ordinary business?

A. Yes; at the time of his death this was the largest case he had on the docket, and I remember a good deal for that reason.

Q. (Witness shown a letter purporting to have been written by A. Le Breton Des Chappelles.) I ask you whether or not this letter was received by your husband in due course of mail?

A. This letter I had. I brought it down.

Q. State where you got it.

A. I found it in his papers, but I am not sure I found it in his docket.

Q. Do you know the handwriting of Mr. Des Chappelles?

A. Yes.

Q. Do you remember seeing him write?

A. I have a card of his on which he wrote his own name.

Q. Did he ever visit you?

A. I don't know whether Mr. Janin made him come to Washington, but he dined with us at Washington, once.

Q. That in his handwriting?

A. Yes.

(Letter offered and filed in evidence.)

56 Q. Do you know whether that was the same Des Chapelles connected with the suit of Dalcour and others?

A. Mr. Janin had nothimg to do with him, except in a business way; he summoned him there.

Q. You spoke of his employing Fleming & Daniel in another case; do you know what that was?

A. A case of judgment against his clients. I think Mr. McCabe had a good deal to do with that case. I know Mr. Janin said, after he took this large case for Forbes, he found there was a judgment against his people for a great deal of money, and he said he would never have undertaken this case had he known it was handicapped; it would cost him too much time from this business, and he would have to reverse the judgment before he could go on with the original case. I remember his saying to Des Chapelles and Innerarity when they would write to him to go on with the case, he said he could not do any more work on the case until he got that judgment out of the way.

Q. Did you know Madam Eugenie Olivie?

A. Yes; I went to her house in the country with my husband to discuss the case with her. She took us up to New Iberia, where she had a plantation. I think she was the granddaughter of John Forbes, and she was an old lady and walked with a crutch.

Q. In what State?

A. In Louisiana. He took me up in order to see about the details of the case—look over the family papers.

Q. Is she living?

A. No, she is dead. Some of my friends wrote me she was dead.

Mr. STRIPLING. I object to the introduction of the letter upon the ground that it is not pertinent to anything before the court; does not tend to prove anything.

Mr. DEWHURST. We will have it connected later and ask to have it filed.

Cross-examination be Mr. STRIPLING:

Q. Do you know who was the attorney of record in the case about which you have been testifying?

57 A. My husband.

Q. Do you know whether or not the suit was b'ought by him?

A. Yes.

Q. Do you know whether or not his name appeared as attorney in any of the papers?

A. Yes.

Q. Did you ever see any of the papers in the case?

A. A great many of them.

Q. Was his name signed to the petition in the case?

A. Yes.

Q. Are you sure about that?

A. Yes.

Q. Did you ever see any of the papers after they were filed in the court?

A. When you file papers in court—I suppose he left them there.

Q. Did you aid or assist in the preparation of the petition in the suit about which you have been testifying?

A. I helped him a good deal. I think most of these things, important law papers—he had no clerk—and most all his papers of importance he wrote out himself and filed it. I copied a great many papers for him, and I copied lists of land and those things—townships——

Q. Do you know whether Forbes or the heirs of Forbes had other suits?

A. Yes, had several other suits; he was the lawyer for Forbes.

Q. Do you know what lands were involved in the suits about which you are testifying?

A. Land to the extent of two million and a half acres. He had a great deal of that business.

Q. Do you not know that the heirs of John Forbes claim lands under different grants from the Spanish Government?

A. I have seen on the map the Forbes purchase, and I have seen accounts in his papers.

Q. Have you any distinct recollection as to the nature of the claim of your husband's clients; that is to say, from whom they claimed to inherit?

A. They claimed to inherit from John Forbes, some from Forbes, and some from James and John Innerarity.

58 Q. Do you know this independently, now, without reference to any memorandum made at the time?

A. Yes, of course; he talked a great deal about it; he had a great many of the heirs come there to see him; often dined with him and talked of the situation of the case.

Q. Do you know when this suit was instituted?

A. I know it was instituted under the act of 1860 or '62; that is my husband's business.

Q. Do you remember the day of the year in which this suit was instituted?

A. I remember when Mr. Janin came in the suit after my marriage, between '77 & '79, when he and I came down, but it was an old suit then. He said he revised and amended the petition because he did not think it was brought in the proper way.

Q. You were married in what year?

A. '77.

Q. And your husband took charge of this case——

A. Shortly afterwards.

Q. So you don't know when the suit was instituted?

A. The original suit? It was not a new suit, a suit had been instituted before by other attorneys.

Q. Are you interested in the result of this suit?

A. I don't know. My husband had a contract in all these land cases for a large percentage.

Mr. DEWHURST. We object to the witness making any statement on the record.

By the COURT. A party has a right to know a witness' feeling in the outcome of a case, to determine whether their testimony will be influenced by their interest in the case.

By the WITNESS. My husband had a large contingent fee of quarter

of the claim. I believe some of the heirs think that interest lapsed at his death. It was a case in which he put a great deal of work, and I don't want anyone to suffer from his death but myself. I would like to get the money, of course, if I could get it, but I don't know anything about that.

Q. Where do you live now?

A. In Washington.

59 Q. Are you here in Florida specially as a witness in this case?

A. Yes; Mr. Dewhurst sent for me.

Q. Are you paying your own expenses?

A. He sent a check of $80 to come down.

By Mr. DEWHURST:

Q. I call your attention to your testimony as to whether it is correct your husband signed as attorney the original petition in the suit?

A. I told you my husband was not in the orignal suit; he was not in the original suit because it was pending many years. I supposed meant whether he signed it when he filed it in court.

Mr. DEWHURST. We offer in evidence certified copies from the records of the case of Thomas Dow et al. against Venanchie Sanchez, administrator of John Forbes in the Circuit Court of Florida, St. Johns County:

1. Withdrawal of John B. Stickney as counsel dated March 26th, 1878.

2. An affidavit of Teresa Olivier, in which she states she is one of the heirs of John Forbes and interested in the suit pending in the U. S. Circuit Court for the Northern District of Florida.

3. Affidavit of Theodore Dalcour made August, 1879, in which he states the same facts.

4. A certified copy of the order made by Judge Archibald in the suit of Theodore Dalcour et al. against Thomas Dow et al. dated Feby. 7, 1888.

(Objected to by district attorney.)

Mr. DEWHURST. I also offer in evidence 23rd Florida, in which the decree of the Supreme Court of the State of Florida is rendered, to show the date of the rendition of the decree in that suit (rendered June term, 1887) and the result of the decree, that it reversed the decree in the State court in St. Johns County and dismissed the bill.

Also offer report of the commissioners of the U. S. for the con-

60 firmation of land titles in Forida, pages 94 to 96 inclusive. Report # 2 of vol. 4 (Duff Green ed.) American State Papers.

WILLIAM MCCABE, produced as a witness on behalf of petitioner, being duly sworn, testifies as follows:

Direct examination by Mr. DEWHURST:

Q. Will you please state your residence, name, and occupation.

A. Toronto, Canada; occupation, managing director of the North American Life Ins. Co.; William McCabe.

Q. Have you any other profession or occupation besides that of general manager of the North American Life Ins. Co.?

A. I act as consulting actuary for the Commercial Travellers Association of Canada. That is the only outside business outside of my private business.

Q. Prior to your active participation in the insurance business had you any profession or occupation?

A. I was admitted to the bar of Florida, having previously graduated in law in Canada.

Q. Are you a member of the bar of any other courts?

A. Yes; of the Supreme Court, of the Circuit Court of the 2nd Judicial District, Supreme Court of the State, and of the District and Circuit Courts of the United States in this State.

Q. When did you first visit the State of Florida?

A. The latter part of 1875.

Q. What business brought you to the State of Florida?

A. I came to Florida in consequence of having received powers of attorney from my father-in-law, Thomas Dow, and others, members of the firm of Panton, Leslie & Co., and I came here for the purpose of seeing what interest they had.

Q. What did you do under those powers of attorney with reference to their interest?

A. My recollection is I visited Tallahassee first. I had letters of introduction to some of the leading citizens there, and on inquiry I heard of the pendency of this suit.

Q. What suit do you refer to?

A. The suit I am testifying in, Theodore Dalcour et al. against
61 the United States.

Q. Do you know whether that suit was pending at that time?

A. Yes; it was pending.

Q. Do you know how long it had been pending?

A. Since the 3rd of March, 1875.

Q. In what court was it pending?

A. My recollection is—although the copy of the petition I made will enable me to speak with accuracy—my recollection is it was entitled in the District Court of the State of Florida?

Q. What District Court of the State of Florida?

A. My impression is that it did not name any district. I would like you to show me the copy I made, so I can speak accurately on that point.

Q. (Witness is shown a paper purporting to be signed by Alexander Steele, atty. & counselor at law.) Is this the paper to which you refer?

A. This purports to be a copy of the petition on file, and it is entitled —addressed to the hon. judge of the District Court of the United States for the District of Florida.

By the COURT. You made a copy of that?

A. This is a copy in my own handwriting.

Q. From the original?

A. Yes.

Q. Where did you find the original?

A. In the clerk's office; Mr. Foster's office, in Tallahassee, who was then clerk of the court there.

Mr. DEWHURST:

Q. Did you copy that paper at the time you copied other papers which appear as exhibits in your testimony?

A. Yes; I copied those which I thought at the time, or was advised

by Judge Baker, who was the counsel I employed—I copied those which I thought had a bearing on the interest of those for whom I was acting, and those only.

Q. Take that paper (amended petition) and state whether you copied that at the same time you copied the others? (Paper shown witness.)

62 A. No; this paper was put in some considerable time after.

Q. What caused you to have the desire to copy papers pending in this suit of Dalcour et al. against the United States?

A. My recollection is very strong that I did it either at the request or suggestion of Judge Baker, who I had employed to represent the interest of the parties whom I represented.

Q. What were the parties you represented engaged in doing?

A. If the court will allow a little explanation. I was traveling in Europe in '75, for some months, and had letters from my father-in-law to leading gentlemen in London and other parts of Britain, who had been writing him on the interests of the old firm of Panton, Leslie & Co., in Florida, which they desired him to investigate, and he handed me those papers when I was about leaving for Europe, and requested me to call especially on a Mr. Root, who had been a leading merchant in Britain, and was then residing in London, England. Mr. Root had in his possession, if my memory serves me, a bond executed by the late John Forbes, who had been a member of the firm of Panton, Lesley & Co. This bond admitted the receipt by John Forbes as legal representative of the members of the old firm—that is William Panton, John Leslie, and Thomas Forbes, a brother of John, of $62,000 their moneys, which he had received. I recollect he gave this bond to pay us as soon as questions were decided, and it was in consequence of that bond that I began to investigate whether there was assets in Florida on which a judgment could be made.

Q. Assets of whom?

A. John Forbes. This contract was made originally as representative of the old firm.

Q. State whether you took any legal proceedings to enforce that bond?

A. I did. Under the advice of Judge Baker I made these copies I have mentioned, or at his request, to guide him in the framing of his proceedings. His opinion was that those parties could intervene in the suit then pending in the District Court of the United States for

63 Florida; the suit of Dalcour et al. agst. the United States.

Q. Was that opinion justified by the results?

A. It turned out it was not. A petition was presented to the late Judge Frazier and the judge overruled it.

Q. What did Dow & Co. do to enforce their bond?

A. It was ascertained, just how I don't recall at present, that John Forbes had a legal representative in this State, a Venachie Sanchez, who had taken out letters of administration, and suit was brought against Mr. Sanchez on the bond.

Q. What was the result of that suit?

A. A judgment in favor of the parties to whom the bond had been given, Panton, Leslie & Co., and their heirs and descendants.

Q. Did you appear on the record in that suit?

A. I was attorney.

Q. As counsel for Dow and others?
A. Yes.
Q. Where was the suit brought?
A. My recollection is it was brought in this circuit, owing to the residence of Mr. Sanchez being in the circuit.
Q. Do you know what county?
A. I think St. Johns County; I am not positive.
Q. Do you know what the ultimate result of that suit was?
A. Judgment in favor of the complainants.
Q. What was the amount of the decree—was it a money decree?
A. Yes.
Q. How much?
A. In the neighborhood of two million of dollars.
Q. What was the ultimate result?
A. The decree was reversed.
Q. Do you know when it was reversed?
A. I do by having quite recently refreshed my memory. I see it is reported in the volume to which you referred.
Q. 23rd of Florida?
A. Yes; sometime in 1887.
Q. What effect did that suit of Dow et al. against the admr. of John Forbes have on the case of Dalcour et al. against the United
64 States pending in the U. S. Court, if any?
A. I may say I watched the suit against the United States very carefully and I found no real progress was made, but I didn't know the cause until quite recently; in fact, until I heard it from Mrs. Janin.
Q. While you were engaged in the suit of Dow et al. against Sanchez, what did you purpose to do in the case of Dalcour et al. against the United States?
(Objected to. Objection sustained.)
Q. From your connection with this bond given by John Forbes, and by representing the parties claiming under that and under the decree obtained in the Circuit Court of Florida, you were interested in the progress of the suit in the U. S. Court?
A. Certainly.
Q. Did you make any such investigation of the proceedings in the U. S. Court as will enable you to state the purpose of that suit; can you state it?
A. My knowledge is based altogether on the petition filed, of which I made a copy. As I understand it, the petition sought the confirmation of the tract of land embraced——
Objected to.)
Q. This paper which you have there, you have stated in your testimony purported to be a copy. I ask you whether or not this is a copy, and whether you copied the original petition in the suit of Dalcour et al. in your own handwriting, and if that is the copy you made?
A. I copied the original petition as on file myself, and this is a copy of that petition, in my own handwriting. If I used the word "purport" it was done inadvertantly; I intended to state it was a copy as carefully as I could make it, and in all probability revised carefully, because I wanted to be accurate in giving the information to my colleague.

Q. Does that contain the whole original petition as filed in the U. S. Court, without the exhibits?

A. It it put on ordinary legal paper, and each sheet is numbered.

65 Yes; this is a copy of the petition as made by me in the latter part of '75 or early in '76, except the title of the cause and the file mark, apparently.

Q. Isn't the title of the cause and the file mark there?

A. Unless this is the file mark, sworn to on the 3rd of March, '75, by Charles H. Foster, clerk of the U. S. District Court, Nor. Dist. of Fla., by ——— Morrison, deputy clerk. My impression is very strong that the file mark and title of the cause were put on a half page, the last page being full and not leaving room for anything else. This has been carried about a great deal and apparently lost or detached.

Q. Except as to the cover of the petition, that is a true and correct copy of the petition?

A. Yes; of the original petition.

Q. In your own handwriting?

A. Yes.

Q. Will you state whether or not that has been out of your possession since the time it was made until the time it has been filed in your deposition?

A. It has not.

By the COURT. You did not make copies of the exhibits?

A. Yes; I made copies of the exhibits which Judge Baker thought important in preparing his intervention.

By Mr. DEWHURST:

Q. State the character of the papers, whether few or small or large in size?

A. I can not recall about that, except my memory was refreshed by the remarks of the clerk. I remember there being a large number in the box.

Q. Was there a book among them?

A. Yes; American State Papers, vol. 4.

Q. Are you sure that volume was there?

A. Yes; because that was the main source of my information.

Q. (Paper marked "Exhibit B" attached to his deposition handed witness.) Is that your handwriting?

A. It is in my handwriting.

66 Q. Will you state when and where you made that copy, and what it is?

A. It is a copy of the lists of lands referred to in the petition as "Exhibit B"—the petition already named—which had been sold by the United States, and within the area of the grant claimed in the original petition as certified on the 22nd of July, '75, by J. A. Lee as being a true transcript from the records of his office; that is correct, the caption U. S. Land Office, Gainesville, Florida, and signed by Mr. Lee as registrar of that office, and has also the file mark the 3rd day of March, A. D. '75, signed Charles H. Foster, clerk U. S. D. C., by C. L. Foster, D. C.

Q. Please state, barring such inaccuracies as are likely to occur in a document of that character, *it is* a true copy of the exhibit which was

attached to the original petition in the suit of Dalcour et al. against the United States, filed in the District Court of the United States?

A. Yes, it is a true copy; and I notice in turning the leaves over it was apparently rechecked and recalled, because there are certain parts corrected as if written in duplicate.

Q. Did you testify when you made that?

A. It took considerable time to copy that document and the petition, but it was done during the hours on which the court was open.

Q. I mean the year.

A. The latter part of '75 or January, '76.

Q. Exhibit B of your deposition?

A. Yes.

Q. And the former one of which you testified is "Exhibit A?"

A. Yes.

By the COURT. Where was that found?

A. In the clerk's office in Tallahassee. I could only do the copying during office hours.

Mr. DEWHURST:

Q. (Paper marked "Exhibit C," referred to in the deposition of William McCabe, handed to witness.) Is that paper in your handwriting?

A. Yes; it is all in my handwriting.

Q. Did you copy it from the original?

A. Yes.

Q. What was the original from which you copied that, and where was it?

67 A. I cannot speak positively of this, because this was copied subsequently to the other two papers. I do not observe any file mark on it to guide me, except it was presented Feb'y 11, '76. My recollection is we sought to make intervention shortly after these papers were copied.

Q. This is signed by Steele. Did he represent you or the Dow people in any way?

A. No.

Q. This intervention you had nothing to do with signed by Mr. Steele. Is that paper attached to your deposition as "Exhibit C" a true copy of the original petition filed in the suit of Dalcour et al. against the United States?

A. Yes.

Mr. DEWHURST. We offer to file these exhibits accompanying the oral testimony of the witness, if the objection made to the deposition is sustained.

Q. (Paper marked "Exhibit D," referred to in the deposition of William McCabe taken on commission, handed to witness.) Is that in your handwriting?

A. Yes.

By the COURT. What paper is it?

Mr. DEWHURST. It is entitled "A copy of the amended petition."

By the WITNESS. I was merely taking some of those copies for my own information, and it was done so as to shorten the writing as much as possible, and in the names of the parties I used the word "so forth."

Q. That only belongs to the parties descendants of Forbes?

A. There is another omission of the descendants of Forbes, and to make it convenient for the court to discriminate I gave a typewritten copy extending those abbreviations.

Q. This only applies to the heirs of Forbes?

A. Yes.

Q. Will you give the reason why you abbreviated as to the heirs of Forbes and not to the heirs of other parties?

A. I did, but not in the same way. In regard to the heirs of , I put M. in the island of C., then the word etcet'ra, including the balance named in the original petition. This is entitled

68 in the U. S. District Court, Northern District of Fla., Forbes heirs agst. the United States, endorsed amendment to petition, file mark December 14, /78, signed P. Walter, clerk.

Q. Except as to the abbreviations in the names and residences of the parties, that is a true copy of the original of the amended petition in the suit of Dalcour et al. against the United States, filed in the District Court of the United States for the Northern District of Florida?

A. Yes; on the date named.

Q. Taking this typewritten copy, which is marked "Exhibit E," referred to in the deposition of William McCabe, state whether or not the names and residences as extended on that typewriten copy are the names and residences that appear in the orginal petition filed in the suit of Dalcour et al. agst. the United States?

A. They are.

Q. (Paper marked "Exhibit F," referred to in the disposition of William McCabe, is handed the witness.) Is that in your handwriting?

A. Yes, all in my handwriting; made by myself.

Q. State when you made it and where?

A. The order is dated December 14th, '78; to the best of my recollection and belief it would be made during my yearly visit to Florida, somewhere in the month of Feb'y or March following, as it was my custom to look at the records and make inquiries as to the state of the case.

Q. (Paper marked "Exhibit G," referred to in the deposition of William McCabe, handed witness.) Is that your handwriting?

A. It is.

Q. Will you state when and where you made it?

A. It is dated—the order referred to regarding the taking of testimony of certain witnesses before A. Abet in the city of New Orleans made by Judge Settle on the 14th of December, '78, and would have been copied by me, to the best of my recollection and belief, as stated in the last case, in Feb'y or March, '79.

Q. You say that is a true copy of the original order of Judge Settle in this case?

69 A. Yes; it entitled Dalcour et al. against the United States.

Q. Can you recall whether or not a map of the lands claimed was one of the exhibits to the petition?

A. That is my recollection. I did not make a copy of that.

Q. (Witness shown a map attached to the amended petition for restoration.) Is that a copy of the map that was attached to the original petition in the suit of Dalcour et al. against the United States?

A. I could not answer that except by inference; it covers the lands and covers the description of the grant, and there was a map covering the same thing.

By the COURT. There was a map resembling that?

A. Yes.

AFTERNOON SESSION.

WILLIAM McCABE recalled.

Direct examination by Mr. DEWHURST:

Q. Please state whether the copies which you made and file here as exhibits are copies of all the papers that were on file in the case of Dalcour et al. against the United States at the time you last saw the papers.

A. They are not copies of all the papers; I did not need copies for the purpose for which I took the original papers only; I took copies of such papers as bore on the progress of the case.

Q. Were they copies of all the pleadings in the case?

A. Yes.

Q. Was there an answer of the district attorney in the case?

A. No, sir.

Q. Wouldn't that be a pleading?

A. I understand it to be so.

Q. Are those exhibits copies of all the pleadings in the case?

A. That I found on file in the case.

Q. Did you find an answer of the district attorney?

A. No.

Q. Do you know whether the district attorney had filed an answer in the case?

70 A. Never to my knowledge; on the contrary, by conversations with other attorneys in the case, Judge Cocke; I frequently spoke to Judge Cocke.

Q. Do you know whether the district attorney had appeared in the case on behalf of the United States?

A. Oh, yes.

Cross-examination by Mr. STRIPLING:

Q. How do you know the district attorney had appeared?

A. He told me so.

Q. Do you know it in any other way?

A. I know it also as an inference from his having appeared in various motions.

Q. Do you know of his having appeared in any motion that transpired in that case?

A. Only as shown by the papers put in; I was not present at the hearing.

Q. Did you ever see a paper to which his name was signed?

A. I don't understand it is usual for an attorney to sign an order.

Q. Did you see his name signed to any paper in that case?

A. I don't recall any other than the papers that I copied.

Q. Did you ever see the district attorney appear in the case at all?

A. I was never present when any action was taken in the case.

Q. You say the district attorney told you he had appeared in the case?

A. Yes.
Q. What did he tell you?
A. He told me he was representing the United States and had appeared for the Government.
Q. Did he tell you he had appeared for the Government?
A. Yes.
Q. How do you recall the circumstance?
A. The late Judge Stickney was a gentleman I met very frequently every time I visited Florida, and we were often talking of this case.
Q. You recollect of his having told you he had appeared in the case; I ask you to recall the circumstances and the time and place he said it.
71 A. I can not recall the time and place, although my impression is it was in Tallahassee.
Q. Do you remember the words Judge Stickney used when he told you he had appeared there?
A. You would not expect me to recall the exact words of something that took place 25 years ago.
Q. The remarkable thing is an attorney should tell you he had appeared in the case?
A. I don't see anything remarkable about it at all.
Q. You say you frequently met Judge Stickney and had conversations with him about the case?
A. Yes.
Q. Can you recall anything about the case?
A. I asked him if he had prepared his case—answer, and the length of time he was taking to prepare it, and said there must be something formidable about it.
Q. He never had prepared a paper?
A. No, sir.
Q. He told you he not prepared any?
A. Yes; several times.
Q. See if you can refresh your recollection and recall the particular conversation when he said he had appeared in the case.
A. I could not amplify what I have already said.
Q. Are you positive he told you he had appeared in that case?
A. Quite; absolutely so.
Q. And he used the word appeared?
A. I understand, knowing something of law, what appearance means.
Q. Can you give the court to understand any particular reason why that impressed upon your memory and other circumstances did not?
A. None other than for the reason stated—I was interested in the matter and the case.
Q. Was it a matter of any importance to you if he appeared in the case?
A. I don't know; Judge Stickney was acting in other cases in which I was concerned with Judge Baker as counsel, and therefore I had occasion to discuss matters with him; and he subsequently
72 withdrew from that case, owing to his feeling that his relations to the Government were incompatable with his duties as counsel in the Dow case.
Q. Do you know where this suit was instituted, whether at Tallahassee or Jacksonville?

A. I always understood from the papers having been filed, marked by Charles H. Foster, who was clerk of the court at Tallahassee, they were probably filed there. I don't know it outside of that circumstance.

Q. All the papers you found in the case were at Tallahassee?

A. In the first instance; in later years they were in Jacksonville.

Q. Were the papers in this case very voluminous?

A. That is my recollection of them.

Q. And you made copies of only such as you wanted for your purpose?

A. For the purpose stated after my examination before the commissioner, and in the examination to-day.

Q. Any purpose you had about it, as I understand, was to watch the progress in this case, and in the event they were successful, your judgment would be a lien on the lands?

A. I suppose so.

Q. What became of that judgment?

A. It was reversed.

Q. Never prosecuted any further?

A. No; it was not. I don't know that there was any ground for further prosecution; I suppose the decision of the Supreme Court would be final.

Q. The Supreme Court grants a new trial sometimes in a meritorious case?

A. The grounds set out in the judgment were such I personally did not see any hope for proceeding further.

Q. You have no judgment?

A. No existing judgment.

Q. Have you any interest in this proceeding?

A. I have.

Q. Please state what it is?

73 (Objected to as irrelevant as to the extent of his interest.)

By the COURT. So far as to the question of the validity of the suit it has no bearing.

Q. State what interest you have in this suit.

A. I submit, your honor, in justice to some of my clients whom I am representing under powers of attorney, and without advice of counsel, I might jeopardize those interests.

By the COURT. If you say you have a contract with some of these clients by which you have an interest as attorney, that is sufficient answer; that you are representing certain clients as attorney in the suit.

By Mr. STRIPLING:

Q. Whom do you represent?

A. I did not prepare myself to answer that question, and at my time of life my memory is not retentive; I could not give you the names with accuracy.

Q. Could you give the names of some you represent?

A. Mr. L. N. Innerarity, of Baltimore.

Q. How long have you been employed by him?

A. I don't remember the date of the power; it is not very long.

Q. Is your compensation dependent on the result of this suit?

A. It is—that is, I am doing this, having represented in the Dow case the heirs of Panton, Leslie & Forbes, the old firm, and some of them

being relatives of my own, and some in poor circumstances, and having been unsuccessful, I felt anything I could do to recover something for them would be proper. I have got a competency myself, and what the recovery would be would be a little matter compared with getting a just claim for those parties.

Q. Will you state what compensation you are to receive in the event of the successful termination of this suit?

By the COURT. That is not necessary.

By the WITNESS. My desire is not to evade any question the district attorney may ask; I wish to tell the truth, the whole truth, and nothing but the truth.

74 By the COURT. I don't think if the witness tries to excuse himself from answering the amount of interest he has, I don't think the court can compel him to testify.

Mr. STRIPLING:

Q. Is the interest large or small in the event of the termination of the suit?

By the COURT. I think the question is sufficiently answered.

(Exception noted to the ruling of the court.)

Q. How long a time were you occupied in making these copies?

A. Once I started, I kept that up as long as the clerk's office was open, until I completed it.

Q. How long a time?

A. My memory would not serve me. I could estimate by turning over a number of pages. I should say—the time the clerk's office opens, go to lunch and close early, I would only have part of a day to do it, but I kept continuously at it until I finished. I am speaking of the original petition and list of lands—several days.

Q. Why did you not apply to the clerk for copies of these papers?

A. There were two reasons: A copy by the clerk would cost a great deal of money; secondly, I had not a great deal of money to spare at that time; thirdly, the clerk could take his own time, whereas my counsel, Judge Baker, wanted to get the information so as to enable him to take such proceedings as he might think advisable; he wanted to get it as promptly as possible.

Q. Have you refused to furnish the information that is in your possession to the present counsel at any time?

A. Who do you mean by present counsel?

Q. Mr. Dewhurst.

A. Not to my recollection.

Q. You made an affidavit in this case in which you stated you had made copies of certain papers, which you would produce if called upon by the court.

(Counsel read extracts from the affidavit.)

A. That does not support your question.

75 Q. Did you ever show those papers to Mr. Dewhurst, or inform him of their contents, before your examination before the commissioner in this case?

A. I have had conversations with Mr. Dewhurst on the subject.

Q. When?

A. Some time in February or March.

Q. How long ago?

A. I fancy last year.

Q. You never showed him the originals until they were produced in this proceeding?

A. I don't recall having done so.

Q. Did he request you to show them to him?

A. I think, your honor, we differed in opinion on that subject. I did not realize what I do now, although I had some knowledge of law, I did not realize a copy of a copy would be of any use in case this copy were lost, and, therefore, feeling a deep interest in the matter, I did not care parting with the originals until they came into the custody of the court, and I think I said that to Mr. Dewhurst, if my memory serves me.

Q. The most you did was simply to inform Mr. Dewhurst you had copies of these papers?

A. I apprehend so.

Q. You did decline to give them to him, or permit him to use them until it was done under color of the process of the court?

A. I protest to the "color"; all I have done was above board.

Q. You refused to give him—to let him have these papers, or even copies of them?

A. I refused to part with the papers.

Q. Until you were questioned by the interrogatories under the process from the court?

A. If you chose to put it that way.

Q. It is a fact, isn't it?

A. It and it is not; it is explainable.

Q. Explain in what respect it is not.

A. I have already stated that several times. In the first place, I attached great importance to these papers after I learned the
76 whole record had been destroyed by the burning of the court-house here, and very incorrectly, as I now understand it, I could not preserve these copies, and anything but the copies would be useless in restoring the record, and therefore I refused to part with them.

Q. Were you instrumental in bringing about these proceedings to reestablish these records?

A. Personally I was not; I was approached on the subject by the other side—by the petitioner.

Q. Who approached you?

A. Mrs. Janin, in the first instance, if my memory serves me.

Q. Did you preserve these records with a view of restoring these proceedings?

A. No, sir; quite accidentally—they were taken in the first instance for the reason already given. That must be entirely clear to you and must be to the court. The records show for themselves; it is not a concocted case in any way.

Mr. DEWHURST. I ask your honor to give the United States ample time to prepare a case; I think they ought to have sixty days.

By the COURT. We will pass the case until Monday, the 15th of April. Further hearing postponed until Monday, the 15th day of April.

H. H. BOWEN,
Law Stenographer.

(H. H. Bowne, law stenographer, room 20, Law Exchange, Jacksonville, Fla.)

(The foregoing has the following indorsement): "District Court of United States, Southern District of Florida. Dalcour et al. vs. United States. Testimony taken. Filed Apr. 29, 1901. E. O. Locke, clerk."

77 *Answer.*

In the District Court of the United States, Southern District of Florida.

DALCOUR ET AL.
vs.
UNITED STATES.

Now comes the respondent, the United States, and for answer to the amended petition herein filed says that the said papers alleged by petitioner to have been destroyed should not be reestablished as a record of this court, for the following reasons:

1st. That the petitioner has not shown by competent evidence the substance and contents of all the proceedings and documents sought to be reestablished.

2nd. That the petitioner shows that he has omitted important parties to the alleged destroyed record.

3rd. That the petitioner has not alleged with sufficient certainty the contents or substance of the documents sought to be reestablished.

4th. That it appears from the petition that the original petitioners had ceased to prosecute the matter sought to be reestablished long prior to the alleged destruction of the alleged record.

5th. It appears from the petition that petitioner has been guilty of gross neglect and laches in delaying to file his petition until ten years after the alleged destruction of the record sought to be reestablished.

6. It appears from the petition that the petitioner is guilty of gross laches by neglecting for ten years since the alleged destruction of the documents alleged to be established, by which laches the United States is prejudiced in obtaining evidence to show that prior to the alleged destruction of said record the said proceedings had been completed.

7. That it appears from the said petition that the original petitioners in the record sought to be established were guilty of gross laches and delay in the filing of their petition and in the conduct of the pro-
78 ceedings in the record sought to be established, whereby the United States is greatly prejudiced, and is prevented by the lapse of time from obtaining evidence as to the relationship of the parties claiming to have certain rights in the alleged petition.

8. That the petitioners are greatly in laches, and should not be permitted to establish the alleged documents, for the reason that ten years have elapsed since the alleged destruction of the alleged documents, they have deprived the United States of its power of obtaining the witnesses to the rights and relationships of the petitioners, and have deprived the United States of its power to obtain evidence of what disposition was made of the original proceedings sought to reestablished prior to the destruction thereof.

9. That the petitioners should not be allowed to reestablish the said documents for the reason that this court will presume after the lapse of

the time shown by the petition that the said proceedings were finally disposed of.

10th. That the petition shows that this court has no authority to reestablish the alleged record, for the reason that if the alleged record should be reestablished and become a suit the same should then be pending in the Northern District of Florida.

11th. That the said petition involves lands lying wholly within the Northern District of Florida.

12th. That the substance of the records and files alleged to have been destroyed are not as set out by petitioners.

13th. That the petition shows such delay and laches on the part of petitioners in failing to file their petition until ten years after the destruction of the alleged records, that the United States is now unable to supply the answer filed to the documents set up in said petition as alleged to have been destroyed, which said answer this court on account of the laches on the part of the petitioners will presume to have set up a good defense to the alleged destroyed petition.

14th. That the papers attached to the petition herein filed and the amended petition, and alleged to have been filed the day of
79 1878, and which is sought to be reestablished was not filed as in said petition alleged.

15th. That the substance of a motion to dismiss, made by the United States attorney upon the filing of the original petition in the records sought to be reestablished, is not given in the papers sought to be reestablished by the petitioner, and that by reason of the long delay of petitioner in neglecting to file their petition to reestablish the United States is now made unable to ascertain the substance of the said motion to dismiss, for which reason this court will presume the same to have been well founded.

Wherefore this respondent says that the prayer of the said petition should not be granted, and that the same should be dismissed at the cost of petitioner.

J. N. STRIPLING,
United States Attorney.

(The foregoing has the following indorsement:) "#210. U. L. 2. In the United States District Court, Southern District of Florida. Dalcour et al. vs. United States. Answer. Filed this 12 day of April, 1901. E. O. Locke, clerk. By Louis Starke, deputy clerk."

80 *Demurrer.*

In the District Court of the United States for the Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

Comes now the petititoners by W. W. Dewhurst, their attorney, and demur to the paragraphs two to thirteen, inclusive, and to paragraph fifteen of the answer of the United States filed herein, and say that said paragraphs of said answer and each of them is bad in substance and do

not state fact sufficient to constitute any defense to their said petition for restoration of the destroyed records in the above-entitled cause.

W. W. DEWHURST,
Attorney for Petitioners.

Matters of law to be argued:

(1) The proceedings are regulated by statute, and by the terms of the statute petitioners are only required to satisfy the court that the statements contained in their petition are true.

(2) That the pendency of this suit is regulated by statute approved July 23, 1894, and the acts of Congress under which the suit was instituted.

(3) That by statute any party or person interested in the destroyed records is privileged to make application for the restoration.

W. W. DEWHURST,
Petitioners' Attorney.

I certify that I believe the foregoing demurrer to be well founded.

W. W. DEWHURST,
Petitioners' Attorney.

STATE OF FLORIDA, *Duval County:*

W. W. Dewhurst being sworn says that he is attorney for the petitioners seeking the restoration of the destroyed records in the above-entitled cause; that the foregoing demurrer is not interposed for delay.

Sworn to and subscribed before me this 15th day of April, A. D. 1901.

E. O. LOCKE, *Clerk.*

(The foregoing has the following indorsement): "#210. U. L. 2. District Court of U. S., So. Dist. of Florida. Dalcour et al. vs. United States. Demurrer to pars. 2–13 & par. 15 of answer. Filed this 15 day of Apr., 1901." E. O. Locke, clerk. By Louis Starke, deputy clerk.

81 *Joinder of issue.*

In the District Court of the United States for the Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

Come now the persons named in the amended petition for restoration by W. W. Dewhurst, their attorney, and join issue upon the first and fourteenth paragraphs of the answer of the United States filed herein.

Petitioners' Attorney.

(The foregoing is endorsed as follows): "District Court of U. S., So. Dist. of Florida. Dalcour et al. vs. United States. Joinder of issue on pars. 1 & 14 of answer. Filed this 15 day of Apr., 1901. E. O. Locke, clerk. By Louis Starke, deputy clerk."

* * * * * * *

85 (Copy.)

DEPARTMENT OF JUSTICE,
OFFICE OF THE SOLICITOR OF THE TREASURY,
Washington, D. C., February 15th, 1901.

J. N. STRIPLING, Esq.,
United States Attorney, Jacksonville.

SIR: The Attorney-General has transmitted to me copy of your letter to me of the 7th inst., in which you ask for information as to the status of a suit instituted in the Northern District of Florida on March 3rd, 1875, to secure the confirmation of certain lands granted to John Forbes and Company in 1818 by Spain.

The Attorney-General states that the records in his Office do not show the presence of any papers relating to the suit, and he therefore asks that such data as may be obtainable from the records of this Office may be sent to you.

The following information is obtained from the annual and term reports of the U. S. attorney for the Northern District of Florida, on file in this Office.

In his annual report for the year ending June 30th, 1876, there is reported the institution of a suit against the U. S., date not given, the form and cause of action being:

"Petition for land floats, etc."

In the column of remarks is the following:

"Suit to recover about 2,000,000 acres of land in west Florida or floats for same, by heirs of John Forbes—continued.—Motion to dismiss petition filed by U. S."

In term report for December, 1876, the suit is stated to have been commenced in March, 1875. In column of remarks is the following:

"Heirs of John Forbes. Suit to recover from the U. S. about 2,000,000 acres of land in west Florida or floats for same—suit commenced 1875 by petition under the law of 1860. U. S. attorney filed motion to dismiss the petition. On motion of plaintiff's solicitor the case was transferred from Tallahasse to Jacksonville and suit continued until next term."

86 In special May term, 1877, report the case was reported as "Pending," and in the column of remarks is the following:

"Suit to recover 2,000,000 acres of land in west Florida or floats for same by heirs of John Forbes. Motion made by U. S. attorney to dismiss suit at February term, 1876. On motion of plaintiff's attorneys the case was transferred to Jacksonville. In the annual report for the year ending January 30th, 1877, the case was reported without comment."

In December, 1877, term report is the following:

"Suit by heirs of John Forbes under act of 1860."

The annual report for the year ending June 30th, 1878, gives date of commencem'nt of suit as March 3rd, 1875. No action in the case is reported.

In December, 1878, term report the case is styled:

"Petition for confirmation of land grant and for floats (Spanish grant)." Remarks, "Suit by heirs of John Forbes and others under act of 1860, to confirm about 1,500,000 acres of land in west Florida, continued."

In annual report for the year ending 1879 the suit is reported, but no action thereon is indicated.

In December, 1879, term report the case is reported "continued."

In annual report for year ending June 30th, 1880, the case is reported, but no action indicated.

In December, 1880, term report, the case is reported as "continued."

In annual report for year ending June 30th, 1881, the case is reported, but no action indicated.

In December, 1881, term report the case is reported as "continued."

In the annual report for year ending June 30th, 1882, the case is reported, but no action indicated.

In December, 1884, term report the case is referred to as "continued."

In the annual report for 1890–1891 there is no mention of the case, but the following note is appended to the report:

87 "This report does not contain any case appended or disposed of in the U. S. courts at Jacksonville, Florida, as the records of said courts and all of its officers were totally destroyed by fire May 18, 1891, and is otherwise defective because the necessary data from which to make a report was destroyed in said fire."

No mention is made of the Forbes case in the reports examined during several subsequent years.

The act of 1860 referred to is supposed to be the act of June 22nd, 1860. (12 Stats. L. P., 85.)

I have sent to the Commissioner of the General Land Office copies of your letter, the letter of the Attorney-General and this letter with a request that he will communicate to me for transmission to you, or to you direct, any information that he may be able to give respecting the subject of your inquiry.

Any information received by me from him will be at once transmitted to you.

Very respectfully,

(Sd.) M. D. O'CONNELL, *Solr.*

(The foregoing affidavit and copy of letter are under one cover, which is indorsed as follows: "# 210 U. L., 2. District Court of the U. S., Southern Dist. of Florida. Dalcour et al. vs. United States. Affidavit in support of motion. Filed this 15 day of April, 1901. E. O. Locke, clerk. By Louis Starke, deputy clerk."

* * * * * * *

88 (Extract from the minutes of the District Court of the United States in and for the Southern District of Florida, dated Wednesday, May 8th, 1901, as the same appears on page 339 of Minute Book designated "New Series C.")

Adg'd term U. S. District Court, So. District of Florida, May 8, 1901.

Present: Honorable James W. Locke, judge, the officers, crier, and bailiffs in attendance.

Ordered: That court be opened. Whereupon court is opened by due proclamation.

* * * * * * *

Order reciting substance and effect of destroyed records, &c.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

This cause coming on to be heard upon the petition and amended petition for the restoration of the record, in the above-entitled suit alleged to have been destroyed by the burning of the United States cou[illegible] at Jacksonville, Florida, on the 19th day of May, A. D. 1891, [illegible] mony having been submitted and considered by the court, the co[illegible] advised in the premises, doth therein find, order, and decree:

1. That a suit by way of petition wherein Theodore Dalcour and others as heirs of John Forbes were petitioners, and the United States of America were defendants, was instituted in the District Court of the United States for the Northern District of Florida, on the 3rd day of March, A. D. 1875, under the eleventh section of the act of Congress approved June 22nd, A. D. 1860, and the act of Congress approved June 10th, 1878, extending the same for the confirmation of two tracts of land within the State of Florida.

2. That the copy of the original petition filed in the suit on the 3rd day of March, A. D. 1875, marked "Exhibit A," in the testimony of William McCabe, and filed herein is a true copy of said petition, and is hereby restored, and it shall have all the force and effect of the said original petition filed in said suit on the third day of March, A. D. 1875.

3. That thereafter an order allowing said original petition in said suit to be amended was made in said cause by the Honorable Thomas Settle, judge of said court, on the 14th day of December, A. D. 1878, a
89 copy of which order is marked "Exhibit F," and is so attached to the testimony of the said William McCabe, and the same is hereby restored and established, and it shall have the full force and effect of the said original order.

4. That on the 14th day of December, A. D. 1878, the original petition filed in said cause was amended, a copy of which amended petition as attached to the testimony of the said William McCabe, and marked "Exhibit E," and it is hereby restored, and it shall have all the force and effect of the said original amended petition.

5. That on the 16th day of December, A. D. 1878, an order was made in said suit for the taking of testimony therein, a copy of which order is attached to the testimony of the said William McCabe, and marked "Exhibit G," and it is hereby restored, and it shall have all the force and effect of the said original order made by the Hon. Thomas Settle, judge of said court.

6. That on the 11th day February, A. D. 1876, a petition for intervention in said suit was presented to the said court and denied, a copy of which petition is attached to the testimony of the said William McCabe, and marked "Exhibit C," which petition is hereby restored, and it shall have the same force and effect as the original thereof.

7. That with said original petition filed March 3rd, A. D. 1875, was filed a map, designating, according to the United States public surveys, the lands claimed in said petition to have been granted to John Forbes

and Company on the 10th day of January, A. D. 1818, and also that part of Vol. IV of Duff Green's edition of the American State Papers refering to public lands, being report No. 2, beginning on page 94 and ending with the first column of page 96 thereof; and also a list of lands within the area of the said claimed grant specially described in the act of possession thereof, given by Governor Masot, as set out in the lower half of column 2, on page 96, of said Vol. IV, American State Papers, Public Lands, which lands in said list had been disposed of by the United States prior to the filing of said petition, as certified by J. A. Lee, register of the United States land office at Gainesville, Florida, which

90 said report No. 2 is in said Vol. No. IV, American State Papers, Public Lands, as given on pages 94–7 thereof, and said lists of lands as compiled and certified to by said J. A. Lee, register, as aforesaid, were also attached to, filed with, and made a part of said original petition filed March 3rd, A. D. 1875.

8. That said suit was pending undetermined in the District Court of the United States for the Northern District of Florida, on the 23rd day of July, A. D. 1894, and by an act of Congress entitled "An act to change the boundaries of the judicial districts of the State of Florida," approved July 23rd, A. D. 1894, was transferred into the District Court of the United States for the Southern District of Florida, and is now pending therein.

9. That by the fire that burned the United States court-house at Jacksonville, Florida, on the 19th day of May, A. D. 1891, all the records and files of said suit were burned and destroyed.

10. That the exhibits attached to the testimony of William McCabe taken on commission in the proceedings for the restoration of the records in said cause, which are marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit E," "Exhibit F," and "Exhibit G," and filed herein, are respectively proved to the court to be copies of the original papers in said suit; and this court, by virtue of the power conferred thereon by the statute in such case made and provided, doth order and decree that the substance and effect of said destroyed records in said above-entitled suit was and is set forth in the amended petition for the restoration of said records, and doth reestablish as the records in said suit the following documents, and doth adjudge the substance and effect of said burned records to be of the same tenor therewith, and doth make the same a part of this order as if herein fully set out, namely:

A. The copy of said original petition filed in evidence and marked "Exhibit A," as the original petition in said above-entitled suit.

B. The copy of the order of Judge Settle, made December 14th, A. D. 1878, allowing amendments of said original petition, filed in evidence and marked "Exhibit F," as the original order made thereon December 14th, A. D. 1878.

C. The copy of said amended petition made and filed December

91 14th, A. D. 1878, which copy is filed in evidence and marked "Exhibit E," as the amended petition in said suit.

D. The copy of the order for the issuance of a commission to take testimony de bene esse dated December 16th, A. D. 1878, filed in evidence and marked "Exhibit G," as the original order to take testimony de bene esse in said suit.

E. The copy of the list of lands within the limit of the grant of land sought to be confirmed but disposed of by the United States prior to March 5th, A. D. 1875, filed and marked "Exhibit B," as the original of the list of lands (so disposed of by the United States) filed in said suit.

F. The copy of a petition for intervention filed in said suit and denied, filed in evidence and marked "Exhibit C," as the original petition for intervention with the denial thereof, as the original of the same and said denial and the court doth order and decree that said copies reestablished shall stand in place of and have the same force and effect as the originals of the said respective documents, files, and records had or might have had if the same had never been destroyed.

Done and ordered in open court this 8th day of May, A. D. 1901, and the same directed to be entered of record in the minutes of said District Court.

JAMES W. LOCKE, *Judge.*

To which order the United States, by its attorney, J. N. Stripling, esq., excepts.

Ordered: That court adjourned one day, at which time the officers, criers, and bailiffs shall attend.

And court is adjourned as ordered.

Attest: E. O. LOCKE, *Clerk.*

(Above decree is also filed endorsed as follows:) "No. 210 U. S. 2 District Court of United States Southern District of Florida. Dalcour et al. *v.* United States. Order reciting substance and effect of destroyed records and reestablishing the same. Filed this 8 day of May, 1901. E. O. Locke, clerk. By Louis Starke, deputy clerk. Ent'd in Dist. Ct. Minutes, p. 339. Entered in D. C. order book, p. 136."

92 *Bill of revivor.*

In the District Court of the United States for the Southern District of Florida.

To the Honorable JAMES W. LOCKE,
Judge of the District Court of the United States
for the Southern District of Floida:

Theodore Dalcour, of the province of Matanzas, in the island of Cuba; Gustave Dalcour and Clavatta Dalcour, wife of John Cowden, of Ellicott Mills, State of Maryland; Eugene Dalcour, of Baltimore, State of Maryland; Frank Dalcour, of Dallas, State of Texas; Clementine Dalcour, of Philadelphia, State of Pennsylvania; Antoinette Dalcour, wife of Edward Dyer, of San Antonio, State of Texas, and said Edward Dyer, and John Cowden of said Ellicott Mills; Francoise Bellechase, of Biaritz, Republic of France; John B. Olivier, Louisa M. Olivier, wife of P. S. Winchester, and said P. S. Winchester, of Iberia Parish, State of Louisiana; Stephen Tennant, Hennrietta Tennant, Leocadie Tennant, wife of A. J. Morrison, and said A. J. Morrison, of London, Kingdon of Great Britain, Blanche Bruce and Robert Bruce, her husband, of Liverpool, said Kingdon of Great Britain; Edmond de Gonser, of Elpaso, State of Texas; Joseph de Gonser and Mary de Gonser, incapable person, by Joseph de Gonser,

her next friend and guardian, of Camajuani, in the Republic of Cuba; Julia G. de Gonser, wife of J. G. del Sallo, and said del Sallo, her husband, of Jerez de la Frontera, Kingdom of Spain; Louisa de Gonser, wife of Louis, the Count of Bescuccia, and the said Louis, Count de Bescuccia, of Paris, Republic of France; Henry de Gonser, and Antoinette de Gonser, of said Paris; Jules Fontena, of Bayonne, Republic of France; John Gillispie Innerarity, of Brooklyn, State of New York; Helen V. Drucos, of Pass Christian, State of Mississippi, and Marcal T. Drucos, her husband, Louis M. Innerarity, of Baltimore, State of Maryland; Emanuel H. Innerarity, of Dallas, State of Texas; Margaret Hiern and Charles H. Hiern, her husband, James J. Innerarity, Fanny Wycoff, and Cornelius Wycoff, her husband, of New Orleans, State of Louisiana; Eloise Wilson and John Wilson, her husband, of Houston, State of Texas; Albert H. W. Innerarity, of Pass Christian, State of Mississippi; Eliza Z. Boggs and R. N. Boggs, her husband, of Long Beach, State of Mississippi; Heloize or Eliza Minor, of Norfolk, State of Virginia; Vincent Innerarity, of Madrid, Kingdom of Spain; Harriette
93 Deschappelles and E. Le Breton Deschappelles, her husband; Eliza M. Barton, Cecile V. Wilson, William H. Wilson, James Wilson, Corine A. Wilson, all of New Orleans, State of Louisiana; Harriett A. Wilson, of Emmitsburg, State of Maryland; John Wilson, of Houston, State of Texas; Heloise Cruzat and William Cruzat, her husband, of New Orleans, State of Louisiana; Eugene Hulse and Melanie Hulse, of Denison, State of Texas; Sidney Hulse, of San Francisco, State of California, Sarah H. Hulse, Mary V. Hulse, and John Hulse, of New Orleans, State of Louisiana; and Emma H. Taylor, of Pensacola, State of Florida, bring this their bill of revivor and supplement against the United States of America, and thereupon your orators complain and say:

(1) That on or about the 3rd day of March, A. D. 1875, Theodore Dalcour, of Matanzas, Cuba, Augustus Dalcour, of Ellicott Mills, State of Maryland, Sophia Sanchez and Theodore Sanchez, of Salvador, Cuba; Theresa Olivier and Eugene B. Olivier, of Lafayette Parish, State of Louisiana; Stephen Tennant, Leocadie Tennant, and Henrietta Tennant, of Lancashire, England; Blanche Bruce and Robert Bruce, of Scotland, Jules Fontena, of Bayonne, France, Edmund Depestre, Louisa Depestre, of the island of Cuba; Julie de Gonser and Jose de Gonser filed their duly verified petition under and conforming to the act of Congress approved June 22nd, 1860, entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," and its extensions, in the District Court of the United States for the Northern District of Florida, in the Middle Division, at Tallahassee, against the United States of America, alleging in substance;

(2) That on January 10th, 1818, the Government of Spain made a grant of land in the Territory of Florida, now the State of Florida, to John Forbes, containing 1,800,000 acres, more or less, the survey of which, as alleged, begins opposite the mouth of Sweet Water Creek on the Apalachicola River, and embraces all the lands between the Apalachicola and Choctawhatchee rivers south of the point of beginning to the Gulf of Mexico, and said grant was in said bill set forth and described at length and in the terms of the original grant, and was also set out by the town-

ships and ranges of the public surveys made by the United States of the lands embraced in said grant, since the "change of flags," and there was attached to said bill or petition a map of said grant delineating
94 said lands claimed by petitioners.

(3) Said petitioners further set forth with unnecessary particularity the facts connected with the making and confirming of said grant by the lawful authorities of the Government of Spain prior to January 10th, 1818.

(4) Said petition further alleged the petitioners to be the heirs and all the heirs at law of John Forbes, alleged to be the grantee in said grant of land.

(5) Said petition also set out that at the date of its filing the United States had sold, or otherwise disposed of, 904,462 and 46–100 acres of a total 1,375,637 and 32–100 acres of said grant as surveyed by the United States, leaving at the date aforesaid 471,174 and 86–100 acres of surveyed land and lands under the Bay of St. Andrews, alleged to be the lands of the petitioners; and said petitioners attached to their said petition certified statements in proof the their allegations, made by the register of the United States land office in Florida.

(6) Said petition also referred to and annexed the report of the commissioners for ascertaining land claims and titles to land in the Territory Florida, which is printed as report No. 2 in volume 4, pages 94 to 96 of the American State Papers (Duff Green's edition).

(7) Said petition also set out the history of another grant of land made to John Forbes for 10,000 acres at the head of the Little St. Marys River in the Territory of East Florida.

(8) Said petition prayed citation to the United States of America and its service upon the district attorney of the United States for the Northern District of Florida that said court decide said claims valid and so decree according to the principles established by the said act of Congress approved June 22nd, 1860.

(9) That thereafter the United States of America were duly served with citation therein and appeared in said cause by John B. Stickney, United States attorney for the Northern District of Florida, and filed therein its motion to dismiss said petition upon the grounds set out in said motion as filed.

(10) That thereafter said cause was by order made therein transferred into the Eastern Division of said District Court on, to wit, the 14th day of December, A. D. 1878, said petitioners obtained an order
95 therein giving them leave and by authority of such leave of court, filed therein their amended petition, alleging that said grant of land was made to John Forbes and Company; that by mistake the original petition averred that the grant was made to John Forbes; that John Innerarity and James Innerarity were partners of John Forbes and grantees with John Forbes of said tract of land.

(11) Said amended petition added as petitioner the heirs of John Innerarity and James Innerarity, and named them as follows:

Fanny W. J. Innerarity, tutrix of Helen V. and Louis Minor Innerarity; Emanuel S. Innerarity; Margaret Innerarity; James I. Innerarity, all of the city of New Orleans, Louisiana; Fanny C. Innerarity, wife of Cornelius P. Wikoff, and said Cornelius P. Wikoff, her husband; Eloise

Innerarity, wife of John Wilson, and the said John Wilson, her husband, also of New Orleans, Louisiana; Albert H. W. Innerarity, of Scott Station, Mississippi; Eliza Z. Innerarity, wife of R. N. Boggs, residing near Pass Christain, Mississippi; and said Boggs as her agent; Eliza Innerarity, widow of Louis Minor, residing in the city of Norfolk, Virginia; James or Santiago Innerarity, residing at Haidaye, France; Harriet F. Innerarity, wife E. Le Breton Deschappelles and the said Deschappelles as her husband; Eliza Melanie Innerarity, wife of John S. Barton and the said Barton as her husband, residing in New Orleans, Louisiana, being the descendants and heirs at law of James Innerarity, deceased; and Victorie Innerarity, widow of W. P. Innerarity, Henrietta Innerarity, widow of Henry Wilson, both of New Orleans, Louisiana; Albert Hulse, residing at Bay St. Louis, Mississippi; Sarah Hulse, tutrix of her minor children, John and Victorie Hulse, residing at Milton, Florida; and Emma Hulse, wife of L. B. Taylor, residing at Pensacola, Florida, descendants and heirs at law of John Innerarity.

(12) Said amended petition dismissed all claims to the grant for 10,000 acres on the Little St. Marys River, and alleged that the heirs of John Forbes were entitled to one-third of the grant between the Apalachicola and Choctawhachee rivers with a like share respectively in the heirs of John and James Innerarity, and prayed the court to decree their claim valid, according to the principles of said act of Congress approved June 22nd, 1860.

96 (13) That thereafter and before any further proceedings were had in said cause (except an order therein for the issuance of a commission to take testimony of certain witnesses de bene esse) on to wit, the 19th day of May, A. D. 1891, the court-house at Jacksonville, Florida, was burned and all the original records and files in said suit were wholly destroyed, save only the motion of the defendant, by its district attorney, made in said cause.

(14) That thereafter, by act of Congress approved July 23rd, 1894, all cases pending in the District Court for the Northern District of Florida, at Jacksonville, Florida, and all records of said court at Jacksonville, aforesaid, were transferred into the District Court for the Southern District of Florida, to be prosecuted therein as if originally instituted in said court; that this suit was on said July 24th, 1894, pending in said District Court for the Northern District of Florida, at Jacksonville, and was by said act of Congrese transferred into the District Court for the Southern District of Florida.

(15) That thereafter certain of petitioners and the heirs and legal representatives of certain of petitioners, on behalf of themselves and all others parties to the original and amended petition, took action under the statute made and provided for the restoration of destroyed records of courts of the United States, and on the 8th day of May, A. D. 1901, by an order of this honorable court, the original files of said suit were restored.

(16) That during the pendency of this suit of the petitioners Leocadie Tennant has intermarried with your orator, A. J. Morrison; that of the other original petitioners there have died the following persons:

August Dalcour, leaving your orators, Gustave Dalcour, Ellicott Mills, State of Maryland; Eugene Dalcour, of Baltimore, State of Maryland;

Frank Dalcour, of Dallas, State of Texas; Clementine Dalcour, of Philadelphia, State of Pennsylvania; Clavatta Dalcour, wife of John Cowden, of said Ellicott Mills; Antoinette Dalcour, wife of Edward Dyer, of San Antonio, Texas; his only heirs at law.

Sophia Sanchez and Theodore Sanchez, leaving your orator, Francoise Bellechasse, the only heir at law of his mother, said Sophia Sanchez.

Theresa Olivier and Eugene B. Olivier, leaving your orators
97 John B. Olivier and Louisa M. Olivier, wife of P. S. Winchester, of the parish of Iberia, State of Louisiana, the only heirs at law of said Theresa Olivier, who survived her husband.

Edmond Depestre, Louise Depestre, and Jule de Gonser and her husband, Jose de Gonser, leaving your orators, Joseph de Gonser, Edmond de Gonser, Mary de Gonser; Julie G. de Gonser, wife of J. G. del Sallo; Louisa de Gonser, wife of Louis, the Count de Bescucia; Henry de Gonser and Antoinette de Gonser, children of said Julie de Gonser, the only heirs at law of said Julie de Gonser, Louisa Depestre, and Edmond Depestre.

James Innerarity, leaving your orator, Vincent Innerarity, his son and only heir at law.

Victorie Innerarity, leaving your orators, Henrietta Deschappelles and Eliza M. Barton, her children, her only heirs at law.

Henrietta Innerarity, leaving your orators, Cecile V. Wilson, William H. Wilson, James Wilson, Harriet A. Wilson, Corinne A. Wilson, and John Wilson, her children, her only heirs at law.

Albert P. Hulse, leaving your orators, Heloise Cruzat, Eugene Hulse, Melanie Hulse, and Sidney Hulse, his children, his only heirs at law.

Sarah Hulse, leaving your orators, Mary Victorie Hulse and John Hulse, her children, her only heirs at law.

(17) That the right and title of said above-named deceased persons in and to the land sought to be confirmed in and by said original and amended petition is vested by the laws of descent in the persons above named as their respective heirs at law.

That there has also died since the institution of said suit L. B. Taylor, the husband of your oratrix, Emma Hulse Taylor.

(18) That by the death of the said several petitioners said suit abated as to such petitioners, but your orators are advised that the persons alive and still before the court of said original petitioners are entitled to maintain the suit and are competent to call upon the court for its decree, deciding the claim of John Forbes and Company to be a valid grant, and that such power is conferred under and by virtue of said act of Congress, approved June 22nd, 1860, and that your orators are entitled to have either an order of this honorable court determining that the survivors of said petitioners in said original petition as amended can
98 maintain this suit without an order of revivor, and authorizing such survivors as surviving petitioners to prosecute this suit to a decree, or else your orators are entitled to have said suit revived against the United States of America and restored to the same condition as it was in previous to the death of the above named of said petitioners who have died since its institution.

To the end, therefore, that the said suit and proceedings may be directed to be prosecuted to a final decree by the surviving petitioners if

this court shall hold such survivors competent to call for its decree, or, otherwise, that the same be revived against the United States of America and be in the same condition as said suit was in on and at the time of the abatement thereof by the death of those of the petitioners in the original petition as amended who are herein shown to have died pending proceedings therein, or that the United States of America may show good cause to the contrary, and may full, true, direct, and perfect answer make to the several matters set forth in the said original petition as amended, as well as the matters set forth in this bill of revivor.

For as much as the United States of America have consented by act of Congress to be sued herein and directed its attorney to defend the same, your orators pray it may please your honor to grant to your orators and oratrixes a writ of subpœna to revive and answer, directed to the United States of America, commanding at a day certain that the United States of America, by its district attorney for the Southern District of Florida, Joseph N. Stripling, esq., be and appear before your honorable court, then and there to answer and show cause, if it can, why said suit and the proceedings therein should not be prosecuted to final decree by the survivors of the petitioners against the United States of America, and be in the same plight and condition as the same was at the time of the abatement thereof, if the same be held to have abated; and further stand to and abide such order and decree in the premises as to your honor shall seem meet.

And your orators and oratrixes will ever pray, etc.

W. W. DEWHURST,
Counsel and Solicitor for Petitioners or Complainants.

99 (The foregoing is endorsed as follows:) "#210. P. 224. L. I. District Court of the U. S. for Southern District of Fla. Dalcour et al. vs. United States of America. Bill of revivor. Filed Oct. 18, 1901."

* * * * * * *

102 *Demurrer to bill of revivor.*

In the United States District Court, Southern District of Florida.

THEODORE DALCOUR ET AL.)
vs.
UNITED STATES OF AMERICA.)

The defendant, saving and reserving unto itself any and all manner of advantage of exception to the want of jurisdiction of this court to entertain the bill of revivor herein, and not confessing or admitting all or any of the allegations of the said bill of revivor, does demur thereto and for grounds of demurrer shows:

First. That said bill of revivor does not set forth any facts sufficient to entitle the complainants therein to the relief prayed, or to any relief in this court.

Second. That said bill does not pray for revivor alone, but does pray for other and different relief.

Third. The allegations of said bill as to the decease of certain parties therein mentioned are vague, indefinite, and uncertain, and do not set forth the date or dates of the decease of said parties.

Fourth. The said bill does not allege whether or not the persons whose decease is therein set forth died intestate.

Fifth. The said bill does not set forth the relationship of the parties seeking to revive, to the parties alleged to be deceased.

Sixth. The said bill does not set forth any title in the parties seeking to revive said suit.

Seventh. The said bill does not show sufficient interest in these parties seeking to revive the said suit to maintain said bill.

Eighth. The said bill does not show sufficient privity in the parties seeking to revive said suit to maintain said bill.

Ninth. The right to maintain the said bill is barred by the statute of limitations.

103 And for divers other good grounds of demurrer apparent upon the face of said bill.

J. N. STRIPLING,
U. S. Attorney.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

J. N. STRIPLING,
U. S. Attorney.

STATE OF FLORIDA, *County of Duval.*

Before me personally came J. N. Stripling, who, being duly sworn, says that he is the attorney for the defendant in the foregoing cause; that the foregoing demurrer is interposed in good faith and not for the purpose of delay.

J. N. STRIPLING.

Sworn to and subscribed before me this December 2nd, 1901.

E. O. LOCKE, *Clerk.*

(The foregoing has the following indorsement:) "#210. Page 224. L. I. In U. S. District Court, Southern District of Florida. Theodore Dalcour et al. vs. United States of America. Demurrer. Filed Dec. 2, 1901. E. O. Locke, clerk. *U. S. Attorney.*"

104 *Order that survivors prosecute in behalf of all interested.*

In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

In the matter of the petition filed October 18th, A. D. 1901, by Theodore Dalcour, Stephen Tennant, Henrietta Tennant, Blanche Bruce, Robert Bruce, Jules Fontena, Leocadie Morrison, formerly Leocadie Tennant, who are alleged in said petition to be the survivors of the persons who filed the original petition herein on the 3rd day of March, A. D.

1875, and Helen V. Drucos, formerly Helen V. Innerarity, Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, formerly Margaret Innerarity, James I. Innerarity, Fanny Wycoff, and her husband Cornelius Wycoff, Eloisa Wilson, and her husband John Wilson, Albert H. W. Innerarity, Eliza Z. Boggs, formerly Eliza Z. Innerarity, and her husband R. N. Boggs, Eliza Minor, Harriette Deschapelles, and her husband B. Le Breton Deschapelles, Eliza M. Barton, formerly Eliza Melanie Innerarity, John Hulse, Victoria Hulse, and Emma Taylor, formerly Emma Hulse, who are alleged in the petition to be the survivors of the persons added to this cause by amendment the 14th day of December, A. D. 1878, and divers other persons who are alleged in said petition to be the successors in title to the parties to the said original and amended petitions, who have died between the filing of the said original and amended petitions, and of the said petition filed the 18th day of October, A. D. 1901.

This cause coming on to be heard on demurrer to the petition filed as aforesaid, to-wit, on the 18th day of October, A. D. 1901, and the same having been argued by counsel for the petitioners and for the respondent, United States, and the court having considered the same, and being advised in the premises.

105 It is hereby ordered, adjudged, and decreed that the said demurrer be, and is hereby, overruled so far as is hereinafter provided.

And it appearing to the court by the said petition that the survivors of the parties to the said original and amended petitions have, in and by their said petition, filed as aforesaid October 18th, A. D. 1901, prayed that they may be permitted to prosecute the further conduct of this case in their own names and for the common benefit of themselves and of all other persons lawfully claiming title to any part of or interest in the land in controversy under John Forbes, John Innerarity, or James Innerarity, and it appearing to the court that the proper and expeditious determination of the cause requires the granting of the said prayer;

Now, therefore, it is further ordered, adjudged, and decreed that the further prosecution of this cause shall be by and in the name of Theodore Dalcour, Stephen Tennant, Henrietta Tennant, Blanche Bruce, and her husband Robert Bruce, Jules Fontena, Leocadie Morrison, formerly Leocadie Tennant, and Helen V. Drucos, formerly Helen V. Innerarity, and her husband Marcal T. Drucos Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, formerly Margaret Innerarity, and Charles H. Hiern, her husband, James I. Innerarity, Fanny Wycoff, and her husband Cornelius Wycoff, Eloisa Wilson, and her husband John Wilson, Albert H. W. Innerarity, Eliza Z. Boggs, formerly Eliza Z. Innerarity, and her husband R. N. Boggs, Eliza Minor, Harriette Deschapelles, and her husband E. Le Breton Deschapelles, Eliza M. Barton, formerly Eliza Melanie Innerarity, John Hulse, Victoire Hulse, and Emma Taylor, formerly Emma Hulse, survivors of the petitioners in the original and amended petitions, for the benefit of themselves and those lawfully claiming the said tract of land or any part thereof, or interest therein under them, and of all other persons lawfully claiming the said tract of *of* land or any part thereof or interest therein, under the said John Forbes, John Innerarity, or James Innerarity, and the final decree to be rendered in this suit, if

for the complainants, shall provide that the complainants or petitioners in the original and amended petitions, and those claiming
106 under them shall share in the benefits of said decree according to their respective rights and interests; and if for the United States, shall bar the original complainants or petitioners and all persons claiming by, through, or under them or any of them.

It is further ordered that if any one or more of the said persons in whose names this cause is ordered to be further prosecuted shall be deceased or die before the final termination of the cause, it shall proceed in the names of the survivors or survivor of the said named persons, so long as one thereof shall survive.

It is further ordered that if any person lawfully claiming said tract of land or any part thereof, or any interest therein, shall desire to intervent for the protection of his interest he shall, upon petition and proof of his said interest, be admitted into the suit as a petitioning party against the respondent.

It is further ordered that the respondent be given sixty days in which to take such further action as it may be advised.

All question of costs is hereby, as between the parties petitioning and those represented by them, reserved until further order.

And it is further ordered that it shall not be considered that the question of laches of the petitioners or the running of the statute of limitations has been passed upon or determined herein in overruling said demurrers, but that said question may be considered and passed upon, upon further hearing, the same as if this order had not been entered.

Done in open court this 5th day of July, 1902, Jacksonville, Florida.

JAMES W. LOCKE, *Judge.*

(The foregoing is indorsed as follows:) "#210, pg. 224, L. 1. District Court of U. S. So. Dist. of Florida. Dalcour et al. vs. United States. Order that survivors prosecute in behalf of all interested. Filed Jul. 5, 1902. E. O. Locke, clerk. Ent. in Dist. Ct. Minutes, p. 495."

107 *Plea.*

In the District Court of the United States, Southern District of Florida.

The plea of the United States of America to the bill of complaint of Theodore Dalcour, of the province of Matanzas, in the island of Cuba; Gustave Dalcour and Clavatta Dalcour, wife of John Cowden, of Ellicott Mills, State of Maryland; Eugene Dalcour, of Baltimore, State of Maryland; Frank Dalcour, of Dallas, State of Texas; Clementine Dalcour, of Philadelphia, State of Pennsylvania; Antoinette Dalcour, wife of Edward Dyer, of San Antonia, State of Texas; and said Edward Dwyer and said John Cowden, of said Ellicott Mills; Francoise Bellechase, of Biaritz, Republic of France; John B. Oliver, Louisa M. Oliver, wife of P. S. Winchester, and said P. S. Winchester, of Iberia Parish, State of Louisiana; Stephen Tennant, Henrietta Tennant, Leocadie Tennant wife of A. J. Morrison, and said A. J. Morrison, of London, Kingdom of Great Britain; Blanche Bruce and Robert Bruce, her husband, of Liverpool, said Kingdom of Great Britain; Edmund de Gonser, of El Paso, State

of Texas; Joseph de Gonser and Mary de Gonser, *in* incapable person, by Joseph de Gonser, her next friend and guardian, of Camajuani, in the Republic of Cuba; Julia de Gonser, wife of J. G. del Sallo, and said del Sallo, her husband, of Jarez de la Frontera, Kingdom of Spain; Louisa de Gonser, wife of Louis, the Count de Bescuccia, and said Louis, Count de Bescuccia, of Paris, Republic of France; Henry de Gonser and Antoinette de Gonser, of said Paris; Jules Fontena, of Bayonne, Republic of France; John Gillespie Innerarity, of Brooklyn, State of New York; Helen V. Drucos, of Pass Christian, State of Mississippi; and Marcal T. Drucos, her husband, Louis M. Innerarity, of Baltimore, State of Maryland; Emanuel H. Innerarity, of Dallas, State of Texas;
108 Margaret Hiern and Charles H. Hiern, her husband, James J. Innerarity, Fanny Wycoff and Cornelius Wycoff, her husband, of New Orleans, State of Louisian*na*; Eloisa Wilson and John Wilson, her husband, of Houston, State of Texas; Albert H. W. Innerarity, of Pass Christian, State of Mississippi; Eliza Z. Boggs and R. N. Boggs, her husband, of Long Beach, State of Mississippi; Heloise or Eliza Minor, of Norfolk, State of Virginia; Vincent Innerarity, of Madrid, Kingdom of Spain; Harriette Deschappelles and E. Le Breton Deschappelles, her husband, Eliza M. Barton, Cecille V. Wilson, William H. Wilson, James Wilson, Corrinne A. Wilson, all of New Orleans, State of Louisian*na*; Harriet A. Wilson, of Emmetsburg, State of Maryland; John Wilson, of Houston, State of Texas; Heloise Cruzat and William Cruzat, her husband, of New Orleans, State of Louisian*na*; Eugene Hulse and Melanie Hulse, of Dennison, State of Texas; Sidney Hulse, of San Francisco, State of California; Sarah H. Hulse, Mary V. Hulse, and John Hulse, of New Orleans, State of Louisian*na*; and Emma H. Taylor, of Pensacola, State of Florida; complainants.

The defendant by protestation, not confessing or acknowledging all or any of the pretended matters and things in said complainant's bill of complaint, mentioned and contained to be true, in such sort, manner, and form, as the same are therein set forth and alleged for plea to the whole of said bill says: That the said bill is based upon and seeks to revive a bill or amended petition which was filed on the 14th day of December, 1878, which said amended petition constituted a separate and independent suit from the original suit filed herein by Theodore Dalcour, of Matanzas, in the island of Cuba; of Auguste Dalcour, of Ellicott Mills, in Maryland; Sophia Dalcour, the wife of Theodore Sanchez, of Salvador, of Cuba, and said Sanchez, as her husband, Theresa
109 Dalcour, the wife of Eugene B. Oliver, of Lafayette Parish, in Louisiana, and of said Eugene B. Oliver, as her husband, all of whom are the children of Sophia or Susan Forbes, deceased; Stephen Tennant and Henrietta Tennant, of Lancashire, in England; of Leocadie Tennant, of Liverpool, in England; of Blanche Tennant, the wife of Robert Bruce, and said Robert Bruce, of Scotland; and Jules Fontena, of Bayonne, in France, all the children of Camille Dalcour, the daughter of Sophia or Susan Forbes; and Edward Depestre and Louisa Depestre, of the island of Cuba, and Jule Depestre, the wife of Jose M. Gonser, of London, England, and of her husband, Jose M. Gonser, and that said original suit filed on the 14th day of December, 1878, as aforesaid, was not filed within three years from the 10th day of June, 1872,

as required by the provisions of an act of Congress entitled "An act to extend the provisions of an act entitled 'An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Mississippi, and for other purposes;'" approved June 10th, 1872. Therefore this defendant pleads the said act of Congress in bar in the said complainant's bill, and prays the judgment of this honorable court whether it shall be compelled to make any further answer to said bill, and prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

J. N. STRIPLING,
U. S. Atty. So. Dist. Fla

UNITED STATES OF AMERICA,
Southern District of Florida.

J. N. Stripling being duly sworn, says that he is attorney of the United States for the Southern District of Florida; that the foregoing plea is not interposed for delay, and that the matters and things set forth therein are true in point of fact.

J. N. STRIPLING.

110 Sworn to and subscribed before me this 27 day of Aug., A. D. 1902.

E. D. DODGE,
Deputy Clerk U. S. Dist. Court.

I, J. N. Stripling, United States attorney for the Southern District of Florida, and attorney for the United States in the above-stated cause, do hereby certify that in my opinion the foregoing plea is well founded in point of law.

J. N. STRIPLING,
United States Attorney.

(Endorsed:) "# 210, Pg. 224, L. I. In the District Court of the United States for the Southern District of Florida. Theodore Dalcour et al. vs. United States of America. Plea to the bill of complaint. Filed Aug. 27, 1902. E. O. Locke, clerk, by A. D. Dodge, dep. clerk."

111 *Motion to strike plea.*

In the District Court of the United States for the Southern District of Florida.

Theodore Dalcour, Gustave Dalcour, Clavatta Dalcour, wife of John Cowden, John Cowden, Eugene Dalcour, Frank Dalcour, Clemintine Dalcour, Antoinette Dalcour, wife of Edward Dyer, Edward Dyer, Francoise Bellchase, John B. Olovier, Louisa M. Olivier, wife of P. S. Winchester, Stephen Tennant, Henrietta Tennant, Leocadie Tennant, wife of A. J. Morrison, A. J. Morrison, Blanche Bruce, Robert Bruce, Edmund de Gonser, Joseph de Gonser, Mary de Gonser, by Joseph de Gonser, her next friend, Julie de Gonser, wife of J. G. del Sallo, Louisa de Gonser, wife of Louis the Count of Bescuccia, Henry de Gonser, Antoinette de Gonser, Jules Fontena, John Gillespie Innerarity, Helen Drucos, Marcal T. Durcos, Louis M. Innerarity, Emanuel Innerarity, Emanuel H. Innerarity, Margaret Hiern, Charles H. Hiern, James J. Innerarity, Fanny Wycoff, Cornelius Wycoff, Eloisa Wilson, Albert H. W. Innerarity, Eliza Z. Boggs, R. N. Boggs, Heloise or Eliza Minor, Vincent Innerarity, Harriette Deschappelles, E. Le Breton Deschappelles, Eliza M. Barton, Cecile V. Wilson, William H. Wilson, Corine A. Wilson, Harriett A. Wilson, John Wilson, Heloise Cruzat, William Cruzat, Eugene Hulse, Melanie Hulse, Sidney Hulse, Sarah H. Hulse, Mary V. Hulse, John Hulse, and Emma Taylor

vs.

United States of America.

The complainants move to strike from the files the paper called a plea, filed by the defendant August 27th, 1902, because—

(1) It does not contain any matter which it is permissible to plead to the bill of revivor.

(2) It purports to be a plea to the bill called a bill of revivor, but is in fact a plea to the amendment to the original bill filed by leave of court December 14th, 1878.

(3) It purports to be a plea to the whole of the bill called a bill of revivor, and hence to the revivor as to all the parties to the original bill and amendment thereto, while in fact it is a plea to that part of the bill called a bill of revivor, alleged in the plea to be based on the amendment of the bill filed December 14, 1878.

112 (4) There is no bill of revivor or proceeding in the nature thereof pending and undetermined in this court, a final order having been made in said cause upon said bill, called a bill of revivor, thus disposing of the said bill and leaving no action to be taken by the defendant except upon the original or amended bill.

W. A. BLOUNT,
W. W. DEWHURST,
Solicitors for Complainants.

(The foregoing has the following endorsement:) "# 210. Pg. 224, L, 1. District Court of the United States, Southern District of Florida. Dalcour et al. vs. United States of America. Motion to strike plea. Filed Oct. 3, 1902. E. O. Locke, clerk."

113 *Order striking plea.*

In the District Court of the United States in and for the Southern District of Florida.

THEODORE DALCOUR ET AL.)
vs.
UNITED STATES.)

This cause coming on to be heard upon the motion of the complainants herein to strike the plea of the defendant, the United States, filed on the 27th day of August, 1902, and having been fully heard and considered, it is ordered that said motion be granted, with leave for the defendant, the United States, to further plead as advised.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., November 21st, 1902.

(The foregoing is endorsed as follows:) "# 210. P. 225, L. 1. United States District Court, Southern District of Florida. Theodore Dalcour et al. vs. The United States. Order striking plea. Filed Nov. 21, 1902. E. O. Locke, clerk. Ent'd D. C. Order Book, p. . Ent'd Dist. Ct. Min., p. 504."

114 *Motion to strike amendment to bill.*

In the District Court of the United States, Southern District of Florida.

THEODORE DALCOUR ET AL.)
vs.
THE UNITED STATES.)

And now comes the defendant, by leave of the court first had and obtained, and shows to the court that the original petition filed by Theodore Dalcour et al. on the third day of March, A. D. 1875, seeks the confirmation of a grant of about 1,800,000 acres of land alleged to have been made by the King of Spain on the 10th day of January, A. D. 1818, to John Forbes; that on the 14th day of December, A. D. 1878, an amendment was filed to said original petition, by leave of court, seeking confirmation of title to lands alleged to have granted on the 10th day of January, A. D. 1818, by the King of Spain to John Forbes, John Innerarity, and James Innerarity, partners under the name and style of John Forbes and Company, which amendment introduces a large number of other individuals alleged to be the heirs of John Innerarity and James Innerarity, as shown by said amendment, and to which reference is prayed, as parties plaintiff in said suit, and the defendant now moves the court to strike said amendment from the files of this suit, upon the ground that the same constitutes a new and wholly different suit, and upon the ground that the same was not instituted and filed within three years from the 10th day of June, A. D. 1872, as required by law.

Jacksonville, Florida, November 21, 1902.

J. N. STRIPLING,
United States Attorney.

(The foregoing has the following endorsement:) "#210. Pg. 224, L. 1. In the District of the United States, Southern District of Florida. Theodore Dalcour et al. vs. The United States. Motion to strike amendment to bill. Filed Nov. 21, 1902. E. O. Locke, clerk. By E. D. Dodge, deputy clerk."

115 *Order denying motion to strike amended petition.*

In the District Court of the United States in and for the Southern District of Florida.

THEODODE DALCOUR ET AL. }
vs.
THE UNITED STATES. }

This cause, coming on to be heard upon the motion of *of* the defendant to strike the amended petition herein, and having been duly heard by argument of counsel for the petitioners and for the United States, now, upon consideration thereof, it is ordered that said motion be, and the same is hereby, denied, and the defendant have 60 days to further plead as advised.

Jacksonville, Fla., Mar. 5th, 1903.

JAMES W. LOCKE, *Judge.*

(The foregoing has the following endorsement:) "#210. Pg. 225, L. 1. United States Dist. Court, So. Dist. of Florida. Theodore Dalcour et al. vs. United States. Order denying motion to strike amended petition. Filed Mch. 3rd, 1903. E. O. Locke, clerk, by E. D. Dodge, deputy clerk. Ent'd in Dist. Ct. Min., pg. 559."

116 *Answer of the United States.*

In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AL. }
vs.
THE UNITED STATES. }

To the honorable the Judge of the District Court of the United States for the Southern District of Florida.

The answer of the United States, defendant, to the bill of complaint of Theodore Dalcour and others, heirs of John Forbes, deceased, &c.; and of Fanny W. J. Innerarity, tutrix, &c., and others, descendants and heirs at law of James Innerarity, deceased; and of Victorre Innerarity and others, descendants and heirs at law of John I. Innerarity, deceased, &c., complainants and petitioners.

This defendant saving and reserving to itself all right of exception to the said bill of complaint, for answer thereto saith:

I.

That heretofore, to wit, on the 2nd day of December in the year eighteen hundred and twenty-eight, John Innerarity, whose descendants

and heirs at law are named as complainants in the petition herein on behalf of John Forbes & Co., filed a petition before the honorable Henry M. Breckenridge, judge of the Superior Court for the Western District of Florida, for the recovery of the very same rights, claims, and causes of action as in this petition now pending are sought to be recovered. And on the 24th day of March, 1829, the said John Innerarity and James Innerarity, for themselves as surviving partners of the firm of John Forbes & Co., and for the heirs and legal representatives of John Forbes, deceased, who, with the petitioners, composed the firm of John Forbes & Co., filed a further petition and amendment before the
117 honorable judge of the Superior Court in and for the Western District of the Territory of Florida, specially authorized by law to adjudicate the claims to land in the said district, for the confirmation of the very same grant and recovery of the very same rights and claims as in this petition are sought to be confirmed and recovered, as appears by a copy of the said petition hereto attached, marked "Exhibit A," and made a part of this answer; and such proceedings were thereafter had that this defendant filed its answer to said petition in said court, which said answer is hereto attached, marked "Exhibit B," and made a part of this answer; and proofs taken and the matter duly argued by counsel for the respective parties; and afterwards, on due consideration thereof, on the 6th day of November, 1830, a decree was made, signed, filed, and entered in said cause rejecting and refusing the prayer of said petition, a copy of which decree is hereto attached, marked "Exhibit C," and made a part of this answer, and the proceedings theretofore had in said cause were duly enrolled and *and* are in the records of said court, which records are, by operation of law, now in the custody and keeping of the clerk of the Circuit Court of Escambia County, Florida. And defendant says that no appeal was ever taken from said decree, nor has said decree ever been set aside, vacated, or held for naught, but was at the time it was entered and enrolled, and has ever since continued to be, in full force and effect, all of which more fully and at large appears by said bill, answer, and decree so formally exhibited, to which bill, answer, record, and decree, for greater certainty, defendant prays leave to refer.

And defendant further answering says, that the proceedings heretofore referred to were proceedings on the merits of the case, and that the rejection of said former petition was a rejection on its merits, and not otherwise; and that the parties to this suit are—some of them—the very same parties, and the others the heirs and legal representatives of the other parties, and all have the very same and no other interest, and the parties to the above proceedings; and that the claim and cause of petition so finally adjudicated was the same claim, right, and cause of petition as that whereon the present petitioners have founded their petition and none other.

118 II.

And this defendant further answering says, that it is true that this claim now pending in this proceeding was presented to the commissioners appointed under the act of Congress approved May 8, 1822, "An act for ascertaining claims and titles to land within the Territory of Florida;" that the said commissioners proceeded to enquire into the validity of said

claim, and that they reported the testimony with their opinions to the Secretary of the Treasury to be laid before Congress for their determination; and that the said report recited a transcript of the alleged grant to John Forbes & Co. with the accompanying papers; that the said report and claim were never acted upon by Congress.

And defendant further answering says, that afterwards, under the provision of the sixth section of the act of Congress approved May 23rd, 1828, "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida," the very same claim was presented to and received and adjudicated by the judge of the Superior Court of the Western District of Florida, upon the petition of the successors of John Forbes and Co. and the ancesters of the present claimants, according to the forms, rules, regulations, conditions, and limitations prescribed to the district judge, and claimants in the State of Missouri, by act of Congress approved May 26, 1824, entitled "An act enabling the claimants to lands within the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims;" that in said proceeding the above-named transcript of the grant and accompanying papers and the evidence before said commissioners were presented and received and admitted in evidence; and the original grant, which was obtained from the Spanish archives at the city of Havana, island of Cuba, was introduced in evidence by the United States, and received and admitted by the judge; and that the decree of the judge was made, entered, and published rejecting said claim, the particulars of which proceeding are set out at length in the first paragraph of this answer; and defendant further answering says, that no appeal was taked from this judgment or decree, and by the express provision of said statutes the same became final and conclusive.

119 III.

And defendant further answering says, that the court has not jurisdiction over the subject-matter of this proceeding, because there is no statute or resolution or permission, general or special, authorizing the bringing of this proceeding to establish a claim for lands alleged to have been granted to John Forbes and Co., as set forth in the petition herein; and especially that the act of Congress of June 22, 1860, "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," under which this proceeding has been instituted, does not confer any jurisdiction to hear, try, and determine the same; that the provision of the act of 1828, that decrees made thereunder should be final and conclusive, was not repealed by the act of 1860, but remained and still remains of full force and effect; that said claims which have been declared to be invalid from intrinsic defects, or fraudulent, under the acts of 1828, were not made valid by the act of 1860; and that the claim in the petition now pending had been rejected by the tribunal and public officer acting under authority of Congress, as fully and at large is set out in the first paragraph of this answer, and is therefore expressly excluded from the jurisdiction of this court by the 11th section of the act of 1860 aforesaid.

IV.

And defendant further answering says, that if this proceeding could be maintained under the act of 1860, and the facts reported before the commissioners should be received in evidence, as stated in the petition herein, then, under the principles of said act, the facts found in the decree of the district judge, set out at length in the first paragraph of this answer, must also be received in evidence.

V.

And defendant further answering says, it denied that the alleged grant mentioned in the petition herein was ever made by the officers
120 whose names are thereto affixed, and says that the grant and title papers presented to the commissioners, whose report is relied upon in this proceeding to sustian the claim, are exemplifications of altered and forged papers, the alterations being in the dates of the originals, so as to bring them within the terms of the eighth article of the treaty of 1819 between Spain and the United States.

And further defendant says, that for a long time before the alleged grant to John Forbes & Co. purports to have been made, negotiations were pending between the United States and Spain for the cession of East and West Florida to the United States, which were known to the Spanish authorities in America, and to this firm of John Forbes and Co., that much scandal and many charges of bad faith had grown out of the fact that grants had been made of great tracts of land whilst these negotiations were in progress; that these grants had been made for the purpose of alienation and not for the purposes of colonization and settlement, which latter had always been the avowed policy of the Government of Spain in her colonies; that they were made as pure donations or without the formalities and solemnities usual and required in such cases; that the alleged grant set up in the petition herein was of this character, made without a survey, without any designation whatever of the quantity of land pretended to be granted, and without any knowledge on the part of the Spanish authorities at Havana, or of the grantees of the quantity included in the generally stated boundaries in the request or petition of the said John Forbes & Co. Defendant further says, that the alleged grant purporting to be in consideration of losses which had been sustained by the said John Forbes & Co. from Indian depredations, for which the Spanish Government was liable; that there was no statement of said losses, nor examination into the amount or validity thereof; that the Spanish Government was not liable to pay the same, if such there were, and
121 that for these reasons the grant, if made at all and within the time limited in the treaty, was made without proper authority by the captain-general of Cuba and is null and void.

VI.

And this defendant further answering says, that the immense tract of land pretended to have been granted to the ancestors of these petitioners was, at the time the said pretended grant purports to have been made, and continued up to the change of government to be in the possession

of the Indians as their residence and common hunting grounds; and the said John Forbes & Co. were never in possession of the same.

Wherefore the defendant, having fully answered the allegations of the petition herein, prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

J. N. STRIPLING,
United States Attorney for the Southern District of Florida.

122 EXHIBIT A.

To the honorable, the Judge of the Superior Court in and for the Western District of the Territory of Florida, specially authorized by law to receive and adjudicate the claims to land in the said district.

Your petitioners, James Innerarity and John Innerarity, for themselves, and as the surviving partners of the mercantile firm of John Forbes & Co., and for and on behalf of Francisco Dalcour, son-in-law and executor of John Forbes; Charlotte Elizabeth Dalcour, Camilla Juana Dalcour, Catalina Sophia Dalcour, Juan Theodore Dalcour, Augustin Jose Dalcour, Teresa Laura Dalcour, Edmond Depestre, children of the former and of Sophia, daughter of John Forbes; Juana Depestre, wife of said Edmond, and daughter of John Forbes, the heirs and legal representatives of John Forbes, late of the Island of Cuba, who, together with your petitioners, composed the said firm of "John Forbes and Company," humbly represent that they have a claim to a tract of land within the district aforesaid and within the jurisdiction of this honorable court, containing a larger quantity of acres than the commissioners of the United States were authorized to decide and which has not been settled under the provisions of the act of Congress supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, which said claim was presented to the said commissioners and filed in their office in pursuance of the provisions of an act of Congress for the ascertaining of claims and titles to land in the Territory of Florida, and reported by the said commissioners to the Secretary of the Treasury in conformity to law, and by him submitted to Congress, to which said reports and documents so as aforesaid made and transmitted, your petitioners refer in Documents 111, page 39, of the "letter from the Secretary of the Treasury, transmitting copies of the reports of the commissioners of land claims in east and west Florida," on the 22nd of February, 1825, as a part of this their petition, by a reference to which your petitioners allege that this honorable court will see the origin of the title and date of the grant, the consideration which moved the then Government of the country to make the same, and the boundaries thereof.

123 Your petitioners further represent to your honor that the said claim has not been annulled by the treaty of the 2nd of February, 1819, nor by the decree of the King of Spain ratifying the same, and was not reported by the commissioners as either antedated or forged, but the said grant and evidence of title presented to, and reported by them as aforesaid, in their report to be genuine, and no question of the validity of the said title of your petitioners suggested, except some doubt of the power of the granting Spanish officers without reference to the King of Spain, in cases of grants of similar extent.

But your petitioners submit that this doubt is ill founded, and will at once be entirely dissipated by the slightest reference to the uniform practices in cases of this sort, in all the Spanish colonies, and the laws and ordinances of Spain which do not limit the governors of provinces in cases of this sort, but leave them entirely at discretion to act for the benefit of the Crown according to circumstances and their best judgments. Your petitioners would, however, suggest to your honor, that even if any reasonable doubt could exist on similar questions in cases of grants purely gratuitous, none whatever ought be felt in the case of a grant made for a valuable consideration, and payment of claim for which it is admitted the Government was liable, as was the fact in regard to the said grant of your petitioners. To deny a proposition so clearly self-evident would be to deny the sover'ignty of the very power from which the only right we have is derived, and that a sover'ign State could not pay her lawful debts, nor satisfy the just claims against her, with such means as she had at command without the risk of subjecting herself to the censure of her successor. Your petitioners further represent to your honor that the claim aforesaid is bounded and described as follows, to wit: A tract of land situate between the river Apalachicola to the east and Choctawhachie to the west, the ocean on the south, and on the north by a line beginning opposite to the creek known by the name of "Sweet Water Creek," lying on the eastern side of the Apalachicola River about three and a half miles north of the bluff known by the name of Allum Bluff, and running west to the Choctawatchie; thence following the sinuosities of said river to its mouth on the Bay of St. Rosa, thence winding
124 along the eastern shore of the same to the sea, the high waters of which form the limits to the south, until the said line joins the boundaries of the land formerly acquired by the said house of Forbes & Co., on the west of the Apalachicola in front of the island of Saint Vincent; thence running along the boundary line of said lands to the river Apalachicola, thence the course of said river to the point of departure of the line serving as the northern boundary line opposite to the aforesaid creek called Sweet Water Creek, containing about one million of acres, more than nine-tenths of which are absolutely barren, wholly unproductive and useless, and, indeed, your petitioners do not believe that the whole of said above-described lands contains a larger quantity than fifty thousand acres that are worth the expense of a survey thereof.

Your petitioners further represent to your honor that the said grant, having been made in conformity to the laws of Spain and consum'ated by the royal authority within the time during which that authority is admitted to have existed in full force, is protected and acknowledged by the principles of the law of nations, and is actually guaranteed by the 8th article of the treaty between the United States and Spain of the 22nd of February, 1819, to be held on the same footing and to the same extent as it would have been held had the government of the country where it is situated never been changed.

Your petitioners further represent that they are not apprised that any portion of the land claimed by the grant aforesaid is held, or claimed by any title adverse to their own, and humbly pray that the validity of their claim may be inquired into, according to the true and equitable intent

and meaning of the said treaty of the 22nd of February, 1819, between the King of Spain and the United States and the laws and ordinances of Spain under which it had its origin, and the acts of Congress authorizing its decision. And they further pray that upon a due consideration of the premises being had, the same may be confirmed by decree of this honorable court, and that, in the meantime, process may be issued against the United States according to law.

And as in duty bound they will ever pray, &c.

SAM'L ACRE,
Solicitor of Claimants.

125 EXHIBIT B.

To the Honorable Henry M. Brackenridge, judge of the Superior Court for the District of West Florida, sitting by virtue of the act of Congress of May 22nd, 1828, to adjudicate claims to land in said district.

The answer of Benjamin D. Wright, United States attorney for the district aforesaid, to the petition of James Innerarity and John Innerarity, for themselves and as surviving partners for the late mercantile firm of John Forbes & Co., and for the heirs and legal representatives of John Forbes, late of the island of Cuba, deceased, saving and reserving to the said United States all advantage from the many imperfections apparent in said petition, says that the firm of John Forbes & Company procured the said pretended grant by fraud and imposition upon the government of the island of Cuba, inasmuch as the said John Forbes & Co., in order to induce the authorities of said island to make the said grant of land, represented to the said authorities, and pretended to prove by depositions, that the said John Forbes and Company had met with many and severe losses, by robberies and other outrages committed by the Indians, all of which is and was utterly untrue; and had it been otherwise this respondent alleges that by the laws and usages of the Government of Spain and of nations, the Spanish Government was not responsible for the same or any part thereof. And this respondent, further answering, says that for the space of two or three years before the making of the treaty of 22d February, 1819, it was well and generally known that the negotiations, then pending between the Governments of the United States and Spain, must result in the cession of East and West Florida to the United States. Many persons desirous of speculating in lands made application to the Spanish authorities and procured grants, in a manner altogether at variance with that prescribed by the laws of Spain for the disposal of the royal domain and calculated to defraud the United States. The officers of the Spanish Government knowing that after the Floridas should be ceded, the Government of the United States could not hold them responsible, and *the* their own Government would have no interest in looking into their conduct, scarcely refused any application for lands, however extraordinary or extravagant.

126 Many grants were therefore made about the period above mentioned without the least regard to the laws and ordinances of Spain or the interests of the Spanish Government, but solely with a view to the interests of private individuals or companies of speculators. Of this description is the grant in question, pretended to have been made to

the house of John Forbes & Company. If made at all, it was made without any consideration or adequate inducement, without proof of the losses complained of by the house of John Forbes & Co. in their application to the captain-general of the island of Cuba, without any survey or measurement of the land, without having had any valuation set upon it, and without any acquaintance on the part of the Spanish authorities with the quantity of land pretended to be granted, which, as this respondent is informed and believes, is about three millions of acres.

But this respondent further answering says that he does not know and cannot admit that any such grant and title papers as those mentioned in the petition of the said petitioners were ever made or executed by the officers of the Spanish Government whose names are thereto affixed, but expressly requires proof of the same and the production of the supposed original title papers.

And this respondent further answering says that the said tract of land pretended to have been granted to the said petitioners was at the time when the said pretended grant purports to have been made, had always been and continued up to the change of government to be in the possession of the Indians as their residence and common hunting grounds; and the said John Forbes & Co. were never in possession of the same.

This respondent further answering says that the said James Innerarity and John Innerarity were not, in the purchase or the grant of the said land or otherwise, partners of the said firm of John Forbes & Co.; said grant was not made to them nor have they any interest in the said grant of land, and therefore they have no right of petitioning for the same; and further that the supposed grant under which the petitioners claim
127 title to the land was made to the said John Forbes and Company, and this respondent alleges that the said John Forbes before the filing of the said petition departed this life. If he had any heirs and legal representatives, such heirs and representatives should have been parties petitioners herein and ought to have been named by their Christian and surnames, and not merely by the designation and name of heirs and legal representatives of John Forbes, deceased.

This respondent further answering says that the said John Forbes & Co. were merchants, traders, living in towns, not farmers, cultivators of the soil, or stock raisers. They did not want land except for speculation, to the injury of others who would have been deprived of the opportunity of obtaining land by reason of their monopoly. They were all Scotchmen, native subjects of the King of Great Britain, not Spanish subjects, and had never taken the oath of allegiance to his Catholic Majesty. They could not therefore receive or own lands or transmit the same by gift, sale, or devise, or inheritance. And the respondent further says that the said John Forbes and others of the firm died in foreign countries, without legal heirs or representatives in Spain or the dependencies thereof, previous to the change of government in the Floridas, and if they or either of them left any heirs or other legal representatives they were the subjects and residents of Great Britain and not of Spain or the dependencies thereof, and if the said John Forbes or other members of the said firm had any interest in said land the same escheated upon his decease to the Government.

This respondent further answering says that it was never the intention

of the King of Spain or his Government that such large tracts of land should be disposed of either by way of gratuity, sale, or composition without the approbation of His Majesty expressly given, and this respondent alleges that no officers of the Crown, without the royal assent first obtained, possessed the power of granting such large portions of the public domain, and especially that the said captain-general of the island of Cuba had no such power nor was such royal assent procured for the grant set forth in the said petitition. If such power existed or such consent was procured, this respondent expressly requires proof of the same. The
128 policy and laws of Spain have always been in relation to gratuities to allow each family a small portion of land, as much as such family could cultivate, but not to give large quantities of land to some to the prejudice of others, and in making sales to have the land valued, the fiscal ministers consulted, the land disposed of according to the valuation, and then not in large quantities lest the grants "might be hurtful to poor people."

This respondent further answering says that the said several documents mentioned and referred to in the report of the commissioners, and to which the said petition refers, are incompetent, lacking authentication and credit, and this respondent objects to the use of them as evidence, and denies the truth of all the statements and matters of fact in the said documents asserted and set forth, and this respondent expressly requires full proof of all said documents and matters of fact therein stated, recited, and set forth.

And this respondent having fully answered the petition of the said petitioners, prays that the said United States may be hence dismissed with their reasonable costs and charges by them about their defense in this behalf expended.

BENJ. D. WRIGHT,
U. S. Attorney, W. F.

129 EXHIBIT C.

JAMES AND JOHN INNERARITY AND THE HEIRS of John Forbes, dec'd, petitioners, *v.* THE UNITED STATES, RESPONDENT. } On petition.

The petitio'ers claim a tract of land situated between the *the* rivers Appalachicola and Choctawhatchie, St. Rosa's Bay, and the sea, &c., said to contain about one million acres, nine-tenths of which the petitioner' state to be barren and unproductive, and not worth the expense of a survey.

This cause has been very ably and fully argued by the counsel for the petitioners and on the part of the United States.

The powers of the Spanish officers to make grants, the ordinances of the Spanish Kings on the subject of granting land, have been sought after with minute research, in order, if possible, to ascertain the system and the rules established by the Spanish Crown. The particular merits and considerations of the grant under which the petitioners claim have also undergone the severest scrutiny. The subject, however, which has been taken as the last in order by the counsel will be the first to claim

the consideration of the court, and it is whether this be a genuine grant within the time fixed by the treaty, because, if it be not, it is useless to take into view the authority of the granting power or the regularity of the grant.

It is contended for the claimants that according to the Spanish law the proper and only evidence of the grant is that offered by them, which is an exemplification or certified copy of the original in the Spanish archives in Havana. That on the face of this exemplification the grant appears to have been made within the time. They deny that the document marked (A), which purports to be the original minutes and
130 entries procured from the archives, can be used in courts of justice for any purpose. But in the opinion of this court the Spanish law does not furnish the rule of evidence to govern the investigation; this must be conducted according to the law of the court which takes cognizance of the matter, and not to the law of the place or sover'ignty where the right was acquired. Exemplifications of records under seal are the usual and proper evidence in our courts where the original is not under the control or subject to their inspection, but there is no reason why the original record when known and ascertained as such should not be the proper and best evidence. In the claims to lands both in this Territory and in Louisiana the original documents have always been received when proved to be such, while the exemplified copies have been admitted only from necessity. The greater part of these claims have been sustained on the original documents, and if this were not the case serious difficulties might be imposed on them, as it would be impossible for the claimants to obtain certified copies of papers in their own keeping.

I will, however, examine the Spanish law relied upon by the counsel for the claimants, and which has been urged with great earnestness as well as ingenuity. The Curia Filipica, a Spanish work of great authority in relation to the proceedings and practice of the courts of justice in Spain, has been cited. Under the head of Pruebas (evidence), page 93, section 31, it is laid down that the instrument (that is, the public instrument in contradistinction to common written evidence) consists of three kinds, viz, registro, original, y traslado. I have carefully translated this section, as well as two others not referred to by counsel for the claimants, both of which are necessary to a proper understanding of the Spanish law on this subject. The registro is the original min-
131 utes, or first draft, which remains in the office of the escribano, notary, or other officer, for safe keeping, and is that from which the original is made out and transcribed, and by which any doubts that may arise on the original are to be determined: y determinan por ellas las dudas que en et so ofriciera. The original, when properly authenticated, by the notary before whom the act was passed, is that which is to be received in evidence; the first minute is of no further use except as before mentioned, to remain on deposit, to furnish other exemplifications when they may be wanted, and as the model by which to determine their correctness. The traslado is a copy of the original, or exemplification, but it is not evidence in courts unless made under the authority of a judge and citation to the opposite party. It is obvious that the use of the traslado is to save the trouble of filing the original or procuring several originals as a party may have different suits, or wish to keep the original in his possession.

Under this law the counsel for the claimants contend that the original minute or registro can in no case be used as evidence in courts of justice; that its only use is to remain in the office of the notary. But the law declares that one of its most important objects is to determine the correctness of the original, when any doubts may arise upon it; whether this is to be referred to the notary or keeper of the minute, as the sole and exclusive judge, or whether the court before whom the doubt may arise is, of itself, to compare and ascertain, does not appear to be clearly expressed, but I think that this court, according to another section of the Curia Filipica, under the present circumstances, is invested with that power. This is the 23rd section, page 94 & 95. According to this law, if the notary deny having made the instrument, he is to be believed unless the contrary be proved; but if he acknowledge the instru-
132 ment, and the subscribing witnesses deny it, in this case, if the notary be of good reputation and the instrument agree with the registro, the notary is to be believed and not the witnesses. This certainly implies that it is not the exclusive province of the notary to compare the original with the registro. And again it is declared that the same rule prevails when the notary and the witnesses both say they have no recollection (no se acuerden) of the matter. It is further laid down in the same section that if it be admitted that the notary did make the instrument but that he made it falsely and erroneously—that is, that the original is not a true exemplification of the minute—that then the notary is not entitled to faith, and if he be dead, or absent, the judge may proceed, with the assistance of sworn experts, to determine the matter: es a arbitrio la determinacion si vale o no. I am aware that the question here supposed may appear from the text to be confined to those arising in respect of handwriting merely; but practically it must evidently extend to all cases where fraud or mistake is alleged against the notary. It is proper to observe in justice to the claimants that although the law cited from the Curia Filipica, relates to notarial acts, yet from the nature of Spanish records of all kinds where a protocol or registro is required it is equally applicable. Applications for grants of land are made by petition on which follows certain orders and reports, and the final decree thereon granting or refusing the prayer; all these are carried on through the intervention of a notary, who gives the necessary notices, &c., and keeps the whole as a register of original entries. An exemplification of these, or what is called the original instead of a formal patent, as with us, constitutes in the Spanish tribunals the highest evidence of title. While that original remains unimpeached it is conclusive or at least complete. But in this instance it is impeached, and the in opinion of the court it becomes necessary to investigate, and this according to the very
133 law appealed to by the claimants. It is admitted, however, that this investigation or inquiry must be conducted judicially. That which may justify the conscience of an individual, or suffice a committee of Congress, or a board of commissioners, may be insufficient for a judge, who is to determine according to known and fixed rules of decision, and not according to his discretion.

In pursuing this inquiry under the belief that in the present case it is competent to the court to look beyond the original, and for all the purposes that justice may require to compare it with the registro, the next

thing to be determined is whether the document marked "(A)" can be regularly and judicially received as the registro. A judge should not decide according to his private impressions; if he decide at all, he should base his decision upon some distinct and settled principle, or at least on some just and reasonable deduction. Various reasons entitled to considerable weight have been urged on the part of the claimants against the receiving the document just mentioned as the genuine registro. They contend that if it was officially obtained from the Spanish authorities it must have been in virtue of some act of Congress, making it evidence, which could not be done by the mere act of the executive, as the second article of the treaty, under which the agent was appointed, does not relate to the archives or titles to private property, but to the titles of Spain to the territories ceded by her. That if this be the case, the executive could not make evidence in the cause by procuring this document through an unofficial agent, but a regular commission was necessary to prove its identity, and with notice to the opposite party. Because the papers never having been in the possession of either of the parties, and deriving its character only from the original deposit, or official hands where it was found, that fact was essential to entitle it to be received—unless
134 officially obtained so as to be continued in the hands of the agent as keeper of the document in the place of the keeper of the archives, its identity is a fact which ought to be established. It was further contended that the commission to the agent, and his correspondence with the captain-general of Cuba, being only certified copies from the originals filed with the clerk of the Superior Court of the Middle District are not admissable in evidence. And further, that the special agent not being an officer known to the law, acting under oath, he should have sworn that the document as produced was the same which he had received in Cuba, and that it was in the same condition as when so received. That although in the minds of counsel no imputation could attach to the individual who procured the document, yet it was an inference of law that the one by whom the writing was produced must account for the suspicious alterations and erasures.

With respect to the last reason, it is sufficient to remark that if the United States were a party of whom such a suspicion could be predicted, the idea would be repelled by the simple fact that these alterations and erasures are to its prejudice, and in favor of the claimants; for without such alterations the grant on the face of it would be void. The court does not agree, however, with counsel on the part of the United States, who contend that the mere circumstance of serving a subpœna duces tecum on the agent to bring into court the registro makes it the evidence of the claimants, although not offered by them, but objected to after discovering, as they allege, that it was a different writing from what they had expected. It is evident, however, both from the circumstances just mentioned, and from the notice contained in the brief of the counsel, that the parties here did mean to rely on this document, and only changed their minds on the discovery of its defects. But I consider its admissibility put to rest by the testimony taken under a commission by
135 consent, and which has been received in evidence in this case. It is noted by the commissioners before whom the testimony was taken that it was admitted "by both parties that the official signatures to

the document marked '(A)' under which the petitioners claim are genuine." I consider this admission as superceding all further inquiry. The official signatures are admitted to be genuine, and it is further acknowledged that the document itself is the one under which the petitioners claim. Moreover, the original, or exemplification, when compared with the registro, evidently appears to be a literal copy from it, following the alterations.

The supposed grant appears to have originated in a petition by John Forbes for himself and company, and presented to the captain-general in Havana. The first order taken upon it by the captain-general (and which is written without erasure) is dated Havana, 5th of January, 1818. The next is that made by the assessor-general, which has the words "January the seventh" written in paler ink over "February the fourteenth." The subsequent orders have been altered to conform to the preceding, but with so little care that the original word is almost as plainly visible as that which is overwritten. It has been remarked by the counsel for claimants that the alteration from "February" back to "January" may have been made at the time of signing, and which might be lawful, at least innocent, inasmuch as the signing, even if in February, would have been a year before the treaty, and could not have been done in contemplation of the provision which renders void all grants made subsequently to the 24th of January, 1818. It is also said that the alterations appear to be in the same ink with the signatures. It is possible that the dates may have been altered at the time of signing, but in this supposition there was no perceptable reason for altering the date from January when it would have been as good if made in February. The inducement
136 for an alteration of the registro a year or two afterwards, when the time became essential in consequence of the treaty, is obvious. The alterations are not in matters of form or such matters of substance as to cause a mere variation in the terms of the grant, but they are of a nature to effect its very existence. Without them it would be no better than blank paper. Yet even in this case the judge ought not to follow his individual impressions when contrary to settled rules of decision. It is undoubtedly true that according to those rules every reasonable and fair presumption is to be taken in favor of the record and of the public officer. A mere alteration of the date, names, or other substantial matter in the original minute or record, by erasure or interlineation, does not of itself vitiate the record. It is only when this is corruptly done, for it may have been done in order to conform to the truth. Besides, it would be unjust to implicate the conduct and character of the officer in an inquiry to which he is no party and where he has no opportunity of defense. But whatever doubt may exist according to our legal ideas, I find it to my mind satisfactorily decided by the Spanish law—it is not a matter relating to the form of trial, but to the validity of the record itself, which is the foundation of the claim. I refer to the Curia Filipica, page 93, sec. 30. It declares expressly that the public instrument which does not follow those forms and solemnities, which it proceeds to enumerate, is null and void; and among these it is declared to be necessary that there be a salvado, as it is called, of the errors and alterations—salvado antes de las firmas las enmiendas y erratas. There is no salvado to the alterations made in this registro contrary, as far as my experience goes, to the invariable practice in such cases.

The paper was intended to remain in the archives in Havana, and it was supposed that nothing but the original would be used elsewhere; so that if the original would appear fair on its face, the alterations in the registro would be of no importance. If the registro had contained
137 a note before the signatures, of the alteration of the date from "February" to "January," the exemplification, if a true one, would have contained it also, and in all probability would have led to rejection of the claim by the board of commissioners. But unless the exemplifications were also a facsimile the erasures would not appear. It is not intended by anything that has been said to implicate any of the parties in interest in this case in the alterations of the record at Havana. If the document had ever been in their keeping or possession it would become them to account for those alterations, otherwise suspicion would rest upon them; but the circumstances of their interest and probable advantage to be derived from the alteration is not sufficient to warrant a legal inference that they are either the authors of them or procured them to be made. As to the parties here who, as members of the firm, have been engaged in prosecuting this claim, I am induced to believe from their anxiety in the first instance to obtain the registro, and afterwards on having an opportunity of inspecting it, their desire to reject it, that they were previously unacquainted with the alterations. Being fully satisfied that the claimants have no legal grant prior to the 24th of January, 1818, I feel myself bound to reject their petition. I also deem it unnecessary to consider the other points raised by counsel, especially as the greater part of them are now under advisement by the Supreme Court of the United States.

This cause having been at the special term of the Superior Court, held on the second Monday of September, heard, and the substance of the plaintiff's bill or petition appeared to be that they had a claim to a tract of land within the Western District of Florida, containing a quantity of acres greater than the land commissioners appointed under the several acts of Congress for the settlement and confirmation of private land claims were authorized to decide. That said claims had been pre-
138 sented to the said commissioners, and by them reported to the Secretary of the Treasury in conformity to law. That said claim had not been annulled by the treaty of 22nd of February, 1819, nor by the King of Spain ratifying the same, and had not been reported by the commissioners as either antedated or forged.

Whereupon and upon debate of the matter and inspecting the original title papers in this cause, the court doth think fit to so order and decree that for the reasons set forth in the foregoing opinion the prayer of the petitioners for the confirmation of the said claim to the said land be refused and rejected, and the same is hereby refused and rejected. And it is further ordered and decreed that the said petitioners pay as well as the costs of the said petitioners in this case, as those of the United States by them about their defense in this behalf expended.

(Saturday, 6th November, 1830.)

STATE OF FLORIDA, *Escambia County:*

DALCOUR ET AL.
vs.
THE UNITED STATES.

I, A. M. McMillan, clerk Circuit Court in and for said State and county, do hereby certify that the original records, files, and books containing the pleas and proceedings in the case of James and John Innerarity and the heirs of John Forbes, deceased, v. The United States, had in the United States District and Superior Court of West Florida, at Pensacola, begun and held on the sixth day of March, 1831, and continuing on different days until the sixth day of November, 1831, are in my custody and charge as clerk aforesaid, and that the foregoing pages containing the petitions, answer, and decree in said cause are true copies of the originals which are on file in my office as aforesaid.

A. M. MCMILLAN,
Clerk Circuit Court.

139 (The foregoing is endorsed as follows): "# 210. (P. 225.) L. 1. U. S. District Court, Southern District of Florida. T. Dalcour et al. vs. United States. Answer of U. S. Filed May 1, 1903. E. O. Locke, clerk."

140 *Replication.*

In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

The replyants, saving to themselves all and all manner of advantage of exceptions to the manifold errors and insufficiencies of said answer, filed herein by Joseph N. Stripling, esq., attorney of the United States, for the said United States, for replication thereunto say: That they will aver and prove their said petition to be true, certain, and sufficient in law, and under the act of Congress in such case provided. And the replyants say that the said answer of the attorney is uncertain, untrue, and insufficient, and that the matters and things therein contained are not sufficient to debar these petitioners from having their decree of confirmation as is by law directed. They deny all the matters of avoidance to their petition as entirely insufficient in law and equity.

All which matters and things replyants are ready to aver and prove as this honorable court shall award, and they humbly pray, as in and by their original petition (as amended) they have prayed, and for the causes therein, for the confirmation and approval of their titles, etc.

W. A. BLOUNT,
W. W. DEWHURST,
Counsel and Attorneys for Petitioners.

(The foregoing has the following indorsement:) "# 210. Pg. 225. L. 1. District Court of the United States for Southern District of Florida. Theodore Dalcour et al. vs. United States. Replication. Filed May 29, 1903. E. O. Locke, clerk."

141 *Order.*

In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

This cause coming on to be heard by consent of the parties for the appointment of a master pro hac vice, and it appearing to the court from an examination of the pleadings that the cause is ripe for such an appointment, upon consideration thereof it is ordered and decreed that R. B. Archibald, esq., a practicing solicitor of this court, be, and he is hereby, appointed master of this court herein, with directions, after due notice to the solicitors of record for the petitioners herein, and to the district attorney of the United States for the district aforesaid, to examine such witnesses as may be produced before him, and to reduce their testimony to writing, and to take and receive such evidence as may be offered in said cause, and report the same to this court with all convenient speed; and it appearing to the court that special cause therefor exists by consent of the respective counsel of the parties herein, it is ordered and decreed that the time allowed by the rules for the taking of testimony herein, be enlarged to embrace a period of six months after the cause was at issue.

Done and ordered this 1st day of July, A. D. 1903.

JAMES W. LOCKE, *Judge.*

(The foregoing has the following indorsement:) "# 210. Pg. 225. L. 1. District Court of U. S., So. Dist. of Florida. Theodore Dalcour et al. vs. United States. Order appointing master and extending time to take testimony. Filed July 1, 1903. E. O. Locke, clerk, by E. D. Dodge, deputy clerk."

142 *Stipulation of counsel.*

District Court of the United States, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
UNITED STATES OF AMERICA.

It is stipulated and agreed by and on behalf of the United States of America, the defendant in the above-entitled suit, by Joseph N. Stripling, esq., United States district attorney, thereto authorized by the honorable Attorney-General of the United States, and by and on behalf of the petitioners in said suit by W. W. Dewhurst, their attorney of record, as follows:

That a duly certified copy of any portion or portions relevant to the issues in the above-entitled case of a document on file in the State Department of the Government of the United States, entitled "Copia

integra del espediente formado en virtude Real Orden de 29 abril, 1822, que manda se remita á S. M. una rason circunstanciada de las donaciones de tierras en las Floridas de que haya calencia en,etc., Intendencia," and received by the Government of the United States through its consul at Havana, from the Government of Spain, on the 18th day of July, A. D. 1893, may be used as evidence in said above-entitled cause without objection on the part of either party to said suit, on the ground that the same is but an extract or part of said report and not a copy of the entire document furnished by the Government of Spain to the Government of the United States.

It is further stipulated and agreed that either party to this suit shall be at liberty to use as evidence in said suit any part or parts, relevant to the issues in this suit, of the record in the case of Collin Mitchel et al. v. the United States (9 Peters, 71), the translations of the exhibits in the Spanish language filed in said cause to have the same force and effect as the same would have if proved in the above-entitled suit; and the petitioners in this suit shall be at liberty to use as evidence herein the
143 translation of the Exhibit D D in said suit of Colin Mitchel vs. the United States, beginning on page 410 of the record in said Mitchel case, or such parts thereof as are by counsel for the petitioners deemed relevant to have the same and no other effect as if the original document withdrawn from the files of said Mitchel suit by stipulation of counsel therein was produced by the United States in response to the notice served on the district attorney of the United States on the 25th day of August, A. D. 1903.

J. N. STRIPLING,
United States Attorney, Southern District of Florida.
W. W. DEWHURST,
Attorney for Petitioners.

Approved.
HENRY M. HOYT,
Solicitor-General.

(The foregoing has the following indorsement:) "# 210, Pg. 225, L. 1, District Court of the United States, Southern District of Florida. Dalcour et al. vs. United States. Stipulation of counsel. Filed Nov. 11, 1903. E. O. Locke, clerk. By E. D. Dodge, deputy clerk."

144 (From the minutes of the District Court of the United States for the Southern District of Florida, stated term, Thursday, December 31st, 1903, page 75.)

Present: Honorable James W. Locke, judge, the marshal, clerk, crier, and bailiffs in attendance. Ordered, that court be opened.

Whereupon court is opened by due proclamation.

* * * * * * *

THEODORE DALCOUR ET AL.)
vs.)
THE UNITED STATES.)

On motion of the U. S. attorney, A. M. McMillan is allowed to withdraw original exhibits used before the master, certified copies being substituted. (See Order book.)

* * * * * * *

Ordered, that court adjourn until Saturday, January 2nd, 1904.
Whereupon court is adjourned as ordered.
Attest: E. O. LOCKE, *Clerk.*

145 *Report of special master.*

In United States District Court, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

Report of the master in the above-entitled cause.

To the Honorable J. W. LOCKE, *Judge of said Court:*

Having been appointed by this honorable court as master in said cause, by order dated July 1st, 1903, to take and report the testimony offered in said cause, I have the honor to report that on Dec. 28th, 1903, due notice having been given the parties hereto, I sat as master to take testimony; and did take testimony as hereinafter set forth.

Present, R. B. Archibald, special master; W. W. Dewhurst, esq., solicitor for complainant; Joseph N. Stripling, United States district attorney, and Robert A. Howard and H. C. Lewis, esq., United States special assistant attorneys.

Complainant's solicitor offered in evidence a certified copy of the portion of the records of the board of land commissioners, appointed for ascertaining titles to land within the Territory of Florida under the act of Congress May 8th, 1822, relating to the grant to John Forbes and Company, duly certified under the hand and seal of the United States surveyor-general of Florida; the document being in the Spanish language. Filed in evidence and marked "Exhibit A," with these objections:

Defendant objects to the introduction of this paper, marked "Exhibit A," as testimony:

I. That the paper does not contain a finding of facts reported as proven by the board of commissioners; the paper is not the evidence offered before the board and remaining of record.

II. That the evidence made competent by the 7th section of the act of June 22nd, 1860, is competent only at the examination before
146 the commissioners provided for in the 1st and 2nd sections of the act and not in a suit in a court of chancery under the provisions of the 11th section of the act.

III. That the memorandum of the papers set out in the report is not evidence of the execution and authenticity of said papers; that if said papers so claimed to have been presented to the said commissioners could be used in this suit, the only competent evidence would be the papers themselves.

IV. Because the paper offered in evidence is not certified to by an officer having authority to do so.

Solicitor for complainants offered in evidence a certified copy of the opinion of Samuel R. Overton, Joseph M. White, and Craven P. Luckett, the board of commissioners appointed to ascertain titles to lands in

Florida; from the records of said board and also such parts of the records of said board as relate to the claim of John Forbes and Company to the tract of land sued for in this case, certified by the surveyor-general of Florida under his hand and private seal—the same being in the English language. Same objections as to previously filed paper, marked "Exhibit A." Said second paper filed in evidence and marked "Exhibit B."

It is agreed by counsel for the respective parties hereto that copies may be made and filed from the American State Papers of such parts or portions of said State Papers as the solicitors for complainants may desire without offering the entire volume in evidence; the same to have the same force and effect as if the whole volume were to be introduced.

Complainants' solicitor offered such portions of the documents entitled Documents, Legislative and Executive, of the Congress of the United States in relation to the public lands from the first session of the First Congress to the first session of the Twenty-third Congress—from
147 March 4th, 1789, to June 15th, 1834—selected and edited under the authority of the Senate of the United States, by Walter Lowrie, Secretary of the Senate, and printed by Duff Green, Washington, 1834, as set out by the letter of the Secretary of the Treasury, dated Feb. 21st, 1825, to the Speaker of the House of Representatives, transmitting reports of the commissioners of land claims in Florida; the report of the commissioners of land claims in West Florida, dated Nov. 12th, 1824, on page 83 of volume 4, Duff Green's edition, and page 155, G. & S. edition, and also from said volume, beginning at page 94, Duff Green edition, and 169 G. & S. edition the report of said commissioners No. 2, upon the claim of John Forbes and Company to the lands sued for in this petition, and described in the title to said report, beginning at the ninth line of said report, which is introduced by eight lines, reading as follows:

"No. 2. A report of a claim of John Forbes and Company to a tract of land west of the Apalachicola River, in the District of West Florida, by title emanating from the Spanish Government, with an abstract of the evidence reported in conformity to the provisions of the act of Congress approved May 8th, 1822, entitled 'An act for ascertaining claims and titles to lands within the territories of Florida' by the undersigned commissioners, to wit, the claim of John Forbes and Company, the identical language being on page 3 et sequiter and the report of the commissioners on page one of Exhibit B."

The report of the American State Papers is not set forth at length by the special master for the reason that it would unnecessarily repeat the contents of "Exhibit B." State Papers to be marked "Exhibit C." The report certified by the surveyor-general and filed as "Exhibit B" is the same report as printed in said State Papers.

The solicitors for defendant object on the same grounds as to the introduction of Exhibits A and B, and the further objection that this report does not appear to be a complete transcript of the original grant and proceedings before the said commissioners.

148 Complainant offered in evidence a certified copy of township maps according to the United States public surveys of townships one (1) and two (2) north, of range 7 west, and township two (2) north, of range 8 west, showing location, according to public surveys of Sweetwater Creek. Filed in evidence as "Exhibit D."

Defendant's solicitors objected on the ground that said evidence is immaterial and irrelevant and for the reasons stated in former objections.

Solicitor for petitioners offered in evidence a certified copy, furnished by the State Department, of a note from the Spanish secretary of state to the minister of the United States inclosing a translation of an order of the department of state to the captain-general of the island of Cuba, directing that information be furnished the United States relative to grants by the Spanish Government in Florida. Filed in evidence and marked "Exhibit E."

Counsel for petitioners offered in evidence a certified copy from the Department of State of parts of a certain document purporting to have been received by the consul of the United States and commissioners to demand and receive the Florida archives from the captain-general of the island of Cuba, July 18th, 1835. Filed in evidence as "Exhibit F."

Complainant offered in evidence a translation of "Exhibit F." Filed in evidence as "Exhibit G."

Complainant offered in evidence certain other portions of the document from the State Department, of which Exhibit F is a part. Filed and marked "Exhibit H." Exhibits F, G, and H, objected to by defendant's solicitors on the ground that they are incompetent, the originals or certified copies being the best evidence.

Complainant offered in evidence a certified copy from the State Department of a letter addressed to James Ringold, esq., dated April 28th, 1829, filed in evidence and marked "Exhibit I."

149 Complainant offered in evidence an extract from volume 6, American State Papers, G. & S. edition, page 502, translation of a letter from Francisco Tacon to Mr. Van Buren, Secretary of State, dated October 24th, 1829, which reads:

"[Translation.]

"*Mr. Tacon to Mr. Van Buren.*

"SIR: The colonel of infantry in the armies of my August Sovereign, Don Manuel Garcia Muñiz, now a resident of New Orleans, has informed me, under date of the 14th of September last, that by decree of the President of this Union, of the 13th June and 16th July of the present year, orders had been issued to offer for sale, at public vendue, certain lands in Florida, as property of the United States, which comprehend a tract of fifteen thousand acres belonging to the colonel above named, and situated within the jurisdiction of St. Helena, New Felicina, within the district of Baton Rouge; and that he had been obliged to enter the protest contained in the document hereunto annexed.

"This important innovation which would seem to affect many other individuals in the same situation with the claimant places me under the necessity of calling the attention of the President to the serious injury which will accrue from the above-mentioned decree to the vassels of the King, my master, and other proprietors of land granted by the legitimate authorities of His Majesty, as set forth in detail in the statement which I had the honor of addressing to you on the 11th of April of this year. In order that His Excellency may have the goodness to take into his consideration a subject of so much importance, and to take such measures as he

may think proper to cause said grants to be respected, according to the stipulations of the 8th article of the treaty of the 22nd of February, 1819.

"I avail myself of this opportunity to offer to you the assurance of my distinguished consideration.

"God preserve you many years.

(Signed) "FRANCISCO TACON.

"PHILADELPHIA, *24th October, 1829.*"

150 Filed in evidence and marked "Exhibit J."

Defendant objects to the introduction of "Exhibit J," for the same reason that objection was made to the introduction of volume 4 of American State Papers.

Complainant offered in evidence certain extracts from the printed record of the case of Colin Mitchell vs. The United States, 9th Peters, page 711.

On page 638, 9th Peters, it reads as follows: "It is agreed by counsel in this case * * *. It is further agreed that the reports of the Spanish authorities purporting to contain a list of the titles and grants in the Floridas forwarded by the Spanish Government to the Department of State and sent to the counsel for the United States and proved in court be withdrawn, and that the translation of so much thereof as relates to the title in the above case, marked "Exhibit D," filed 22d July, 1830, be substituted to have the same effect as if the original was copied in the record.

Complai'ant offered in evidence certain extracts from a paper marked "DD," an exhibit in the case of Mitchell vs. The United States. Said extracts filed in evidence and marked "Exhibit K."

Objected to on same grounds as offered to the introduction of extracts from the expediente. ("Exhibit F.")

Complainant offered in evidence extracts from the Annual Reports for 1902 and 1903 of the Commissioner of the General Land Office. Report of 1902, pages 171–2, Calhoun County, area unappropriated and unreserved surveyed, 63,074 acres; area reserved, 2,483 acres; area appropriated, 647,953; total area of land surface of the county in land district, 713,510 acres. Description of character of unappropriated and unreserved land: Low pine land.

151 Washington County, area unappropriated and unreserved, 141,697 acres; area reserved, 5,958 acres; area appropriated, 772,245 acres; total area of land surface in said land district, 920,000 acres. Description of unappropriated and unreserved land: Low pine land.

Report for the year 1903, pages 74 and 75.

Calhoun County, area unappropriated and unreserved, 58,595 acres; total, 58,595 acres; area reserved, 2,483 acres; area appropriated, 652,422 acres.

Washington County, area unappropriated and unreserved, 129,460 acres; total, 129,460 acres; area reserved, 5,958 acres; area appropriated, 784,582 acres.

Complainant offered in evidence a sectional map of the western part of Florida, showing location of the Apalachicola and Choctawhatchie rivers

and Sweet Water Creek, Gulf of Mexico, bays and islands and the counties of Calhoun and Washington. Filed in evidence and marked "Exhibit L."

Objected to by defendant as immaterial and irrelevant.

WEDNESDAY, *December 30th, 1903.*

Present, R. B. Archibald, special master; W. W. Dewhurst, counsel for complainant, and J. N. Stripling, United States attorney, and Robert A. Howard and H. C. Lewis, United States special assistant attorneys.

It is stipulated by counsel for both parties that the United States land surveys were extended over the lands mentioned in the petition by the designation of the United States land surveys, and that the lands shown by the reports of the Commissioners of the General Land Office as disposed of have been disposed of under the United States land laws.

Complainant offered in evidence an affidavit of W. W. Dewhurst, with letters attached, marked "Exhibit M."

152 Complainant, to make proof of the translation of the extract from the document on file in the State Department of the United States under a Spanish title, which, in English, is as follows: "Complete copy of the 'expediente,' made by royal order April 29th, 1822, which commanded that a minute account of the donations of land made in the Floridas and recorded under this administration be forwarded to His Majesty, marked 'Exhibit F,'" introduced as a witness Mr. S. E. Carreras, who, having been duly sworn, deposes and says:

My name is S. E. Carreras; age, [illegible] years; occupation, Spanish and Uraguayan consul at Jacksonville, Florida; my native language is Spanish; I am familiar with the translation of Spanish into English.

Exhibit F being handed to witness, he says that had compared it with original Exhibit G, also handed witness; witness says that Exhibit G is a true and correct translation of Exhibit F.

Witness was handed certain other documents marked "Exhibit F," No. 2. Upon examining the same witness says the Spanish appearing in said document F, No. 2, was compared by me with the document bearing the stamp of the State Department, which was present and before the special master, and they are true and correct copies of the pages of said document, and that the translations following the Spanish portions are true and correct translations.

Witness was asked if he had examined the document on file in the State Department, the title of which is given in the certificate of the Secretary of State to "Exhibit F," and he stated that the character of said document is as follows:

"That is a record of the grants made by Spain in the territories of Florida. It contains 371 double pages, and is signed by the intendente of the island of Cuba."

Complainants announce that they rest.

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THE UNITED STATES.

A. M. MCMILLAN, being duly sworn as a witness for the defendant, says: My name is A. M. McMillan; I reside at Pensacola, Florida.

I am clerk of the Circuit Court of Escambia County, Florida. As such clerk I am the custodian, and have in my possession the records, papers, and files of the Territorial Superior Court of West Florida; I also have, as such custodian, in my possession, records, papers, and files of a certain suit in the Territorial Superior Court of West Florida, in the case of John and James Innerarity and the heirs of John Forbes vs. The United States.

Witness handed record book and says: It is the record of the proceedings of the Superior Court of West Florida.

This book contains proceedings of the cases heard and determined in the Superior Court of West Florida, which proceedings are regularly signed from day to day by the judge of that court.

Q. You will please refer to this book and read what record entries you find therein in the case of John and James Innerarity and the heirs of John Forbes against the United States.

Ans. Witness read original entries from the record book, which were offered and read in evidence.

Q. Does the paper you now hold in your hand contain a correct copy of the journal docket entries which you have just read?

A. It does.

154 Q. You will please state whether the paper I hand you is a copy of the entry from the record book, which you have just read, made, and compared by you.

A. It is a copy.

(The defendant now offers its original copy of the original entry from the journal book and asks that it be substituted for the original entry and marked "Defendant's Exhibit I.")

Q. Upon page 510 of that record book is there an entry in the case of John and James Innerarity and the heirs of John Forbes against the United States?

A. There is.

Q. What does that purport to be?

A. It is a decree in the case.

Q. Are the two papers which I hand you a part of the files and records in the case of John and James Innerarity and the heirs of John Forbes against the United States?

A. They are.

Q. What are they?

A. A petition and amended petition.

(Said papers were offered and read in evidence. Complainants' solicitor objects to the foregoing evidence, including all taken from the journal of the court, on the ground that upon the issues in this case the same is immaterial and irrelevant.)

Q. I hand you the answer in the case now on hearing, Theodore Dalcour et al. vs. The United States, and ask you to examine "Exhibit A" and state whether you made and prepared the same, and whether it is a copy of the amended petition filed in the case of John and James Innerarity and the heirs of John Forbes in the Superior Court of West Florida?

A. Yes, sir.

155 (Same objection as above by solicitor for complainants.)

Q. Will you please state whether the paper I now hand you is among the original files of record in your custody in the case of John and James Innerarity and the heirs of John Forbes vs. the United States, heard and determined in the Western District of Florida? (Witness here handed paper indorsed "Answer.")

A. It is.

(Objected to by complainants' solicitor on same grounds as above mentioned.)

(Said paper was read in evidence.)

Q. Please look at "Exhibit B," to the answer on file in the present case, the case before the master, and state whether that is a copy of paper last read, made, and compared by you in the original suit of John and James Innerarity and the heirs of John Forbes v. the United States in the Superior Court of West Florida?

A. It is a copy made and compared by me and duly certified under my seal of office.

Q. Please turn to page 510 of the record book, which is, as you stated, the decree that was entered in the case of John and James Innerarity and the heirs of John Forbes against the United States, and state whether that decree is entered at large in said record book.

A. It is.

Q. And signed by the judge of the court?

A. Yes, sir.

(Defendant offers decree in evidence on page 510.)

(Solicitor for complainants object on the same ground as stated heretofore to petition and answer.)

(Said decree was read in evidence.)

156 Q. You will please look at "Exhibit C" to the answer on file in the case before the master (Dalcour et al. vs. The United States) and state whether the same is a copy of that opinion and decree just offered and read in evidence in the case of John and James Innerarity and the heirs of John Forbes vs. United States.

A. It is a copy made and compared by me and certified under my hand and seal of office.

Q. I ask you to examine the book now handed you and state whether it is in your custody as custodian of the records of the Superior Court of West Florida, and what that book is.

A. It is a record of pleas heard before the Superior Court of West Florida.

Q. Commencing on page 145 and extending to page 147 you will find a petition of John and James Innerarity in the case of Innerarity and the heirs of John Forbes vs. the United States; will you please read from page 146 the application for a subpœna to R. K. Call to produce the original grant in this case?

(Witness read the above entry from page 146.)

Q. I offer from the original the entry from the petition of James and John Innerarity and the order of the court in pursuance thereof, and I present this paper and ask the witness, is that a correct copy of the original from which you have just read to the court?

A. It is a correct copy.

(Question and answer and the evidence offered, objected to on the ground that the evidence appears to be a part of *of* the record and not the entire record, and the entire record appears to be entered in the docket, or minute book, from which witness read.)

157 I now ask leave to substitute copies testified to by witness.

(Substituted copies filed in evidence and marked "Exhibit 2.")

Q. I now hand you a paper and ask you if it is a part of the files and records in the case of John and James Innerarity and the heirs of John Forbes against the United States for the Superior Court of West Florida in 1831, in the case about which you have been testifying?

A. It is.

Q. Is that paper indorsed upon the back?

A. Yes, sir. Exhibit A. La casa de Forbes y Companie 1819.

(Defendant asks leave to file a verified copy of this, marked "Exhibit No. 3.")

Q. This paper is in Spanish?

A. Yes, sir.

I now offer this original in evidence.

Objected to by complainant's counsel upon the following grounds:

In so far as it is an attempt to show that these papers constituted the original grant, that it is not authentically shown that they came from the Spanish authorities; that it appears that they do not come from the proper place of custody; that it appears that they do come from a person who has not the legal custody of such papers, or, in other words, that the person producing them is not the lawful custodian; that the records of the trial of John and James Innerarity and the heirs of John Forbes against the United States shows that the papers were produced to the court with certain alterations appearing therein; no evidence was offered to explain those alterations. (This ground of objection is only

158 made upon the theory that the Government repudiates the presumption that the alterations were made at the execution of the documents, or were legally made by authority.) That this trial is had and this case is to be decided according to the principles of the Spanish laws in force when the Spanish grant was made, and by that law the registro, or original title papers, could not be used in a court of law as evidence, but an exemplified copy, furnished by an authorized official, of this registro called "the original" was the only competent evidence of a grant authorized to be used in courts, as evidence of the official action of the King of Spain and his lawful authorities.

Because there appears to a variation between the registro, as produced, and the original exemplified copy in the hands of the claimants, and this being the case, the registro ought to be in the custody of the keeper of the Spanish archives, and the original exemplified copy should be referred to the notary or official who made the exemplified copy to determine the correctness of the copy by comparison with the registro, and if the notary be dead, then to his successor in office, or other authorized official of the King of Spain, that he may explain the variation appearing between the registro and the exemplified copy furnished as the original or notarial copy.

Because the registro, at certain places, has two dates while the original exemplified copy has only one, the earlier dates, and the lawful keeper

of the registro by the Spanish law is the sole exclusive judge of the correctness of the exemplified original, or notarial copy, which in this case follows the copy of the registro as amended, or corrected, and no testimony of this character has been offered to explain the differences
159 existing between the registro and the exemplified copy, or original, furnished by the notary.

Because under the laws governing this class of evidence the proper foundation has not been laid for the introduction of the registro in evidence, it not having been shown that the notary making the original denies having made it or in anywise impeaches its correctness; nor has the correctness of the original been in any authorized manner impeached or shown to be fraudulent or incorrect.

Because the original is a true and correct exemplification of the registro, and, until the contrary is admitted to be the fact, the registro is not authorized to be used as evidence and the court is not authorized to enter a comparison of the registro with the original exemplified copy.

Because the registro as corrected, and the exemplification originally filed before the board of land commissioners agree in every particular, and therefore there exist no errors or falsities in the original exemplified copy, and there is no occasion for the use of the registro and no authority of law for its use in any court as evidence of the grant made by Cien Fuegos, captain-general of Cuba.

Because under the law which governs the trial of this suit the mere alteration of the dates of the registro by substituting an earlier date therein, whether done by lawful authorities of the King of Spain or by some unauthorized person, does not impeach the exemplified original following the registro as altered, and there is no ground for the presentation of the registro before the court and no authority for the court to investigate and determine the validity of the alterations of the registro, and—

Because the necessary evidence upon which to determine the question can not now be furnished the court.

160 Q. Mr. McMillan, will you please turn to page 207 and read from page 207 to the passage marked "memorandum"?

(Objected to, upon the ground that this evidence is only a part of the record; that the whole record is not introduced.)

Witness then read memorandum from page 207.

(Paper handed witness.)

Q. Will you please look at this paper which I now hand you? Is this a correct copy of the memorandum which you have just read from the original?

A. It is a correct copy.

I now offer this copy as a substitute for the original, marked "Exhibit 4."

(Objected to by complainant's counsel, upon the ground that it is only a part of the record and not the entire record.)

Q. Mr. McMillan, will you please turn to page 496 of the same record? Please read the entry in the same case.

(Original offered in evidence.)

I ask you now, Mr. McMillan, whether this is a copy of the record which you have just read?

(Witness handed paper.)

A. It is a correct copy.

(Objected to, upon same grounds as above.)

I now offer this paper as a substitute for the original, marked "Exhibit 5."

Cross-examination by W. W. DUWHURST, Esq.:

Q. In your direct examination you stated that you were the custodian of these records which you have introduced. State if you exercised such custody by other authority than your commission as clerk of Escambia County Circuit Court.

161 A. No, sir; none except that which I received from my predecessor in office.

Q. How many predecessors in office had you between 1830 and the time you took office?

A. I could not say positively.

Q. Have there been a considerable number of predecessors?

A. Possible three or four.

Q. Do you know of your own knowledge that there have been three or four?

A. With the exception of one year, my predecessor, Mr. LaRua, and his father, I think, held office nearly fifty years.

Q. During the war between 1860 and 1865, was not Pensacola in possession of forces hostile to the United States?

A. I think so.

Q. When you took possession of the office, in what condition did you find the records and files?

A. The court records—case papers—were all there, but not filed systematically—that is, indexed so that you could locate them easily.

Q. Were they or not carefully kept together, or were they scattered?

A. I think the records were all kept very carefully, but not systematically.

Q. Was lack of system such as to have rendered it probable that records of different proceedings should become commingled?

A. It is possible.

162 Q. What action did you take with reference to the records after you assumed office?

A. I rearranged all the records from 1822 up to date.

Q. And what did you do?

A. Filed and indexed them so as to locate them easily.

Q. And did you place them under separate covers?

A. I did.

Q. Do you recall these particular papers as placing them under cover?

A. No, I do not; that was done by my deputy.

Q. Is it not a fact that all the papers in your office are open to examination and inspection by various attorneys practicing at Pensacola?

A. Not at this time, except under the supervision of the clerk. Previous to the introduction of this system of filing the papers were in the vault, open for inspection of attorneys at their own free will.

Q. Please examine page 513 of the record book, from which you have read, and state whether or not there appears to have been any alteration or interlineation in that record.

A. It appears to be somewhat rubbed out—erased.
Q. Is the alteration in the same colored ink as the original?
A. The ink is blacker than the original.
Q. Do you know who made the alteration?
A. I do not.
Q. Do you know when it was made?
A. I do not.

Q. Can you decipher the words that have been obliterated?

163 No, I could not say positively. It looks like "rendered" and inserted above it "renders." To the best of my knowledge it is "rendered."

Q. Can you state positively what the obliterated word is?
A. No; I will not say positively. I can not quite make it out.
Q. That alteration appears in the decree entered in the case?
A. I think it does.

ROBERT A. HOWARD, a witness on behalf of the defendant, being duly sworn, testifies as follows:

Q. Are you connected with the Department of Justice?
A. I am special assistant of the Attorney-General in such cases as he may designate.
Q. Please examine this paper I now hand you and state if you know where it comes from, and everything in detail concerning it within your knowledge.
A. I obtained this paper by having called for it in my official capacity from the clerk of files and records in the Department of Justice.

(The admission of this paper in evidence objected to, because there is no proof of handwriting of the person purporting to have signed it; because the person is long since dead and can not be produced as a witness, and because the paper writing undertakes to give testimony, and states what he did and what was done and is not under the sanction of an oath, and because the document is of a character entirely incompetent as evidence in a court of justice.

Said paper was read in evidence and marked defendant's "Exhibit No. 6.")

164 SIMON E. CARERAS called on behalf of the defendant:

Being first duly sworn, Simon E. Carreras deposes and says as follows:

Q. Mr. Carrara, you have already testified that you are the Spanish consul here. You are familiar with official Spanish and American papers?
A. Yes, sir.
Q. You will please look at this paper which I hand you, which has been introduced in evidence, marked "Exhibit 3," and state what that paper is.
A. This paper appears to be a petition addressed to the captain-general of the Cuban Islands and both Floridas from the firm of Forbes & Company, in which they ask some compensation from the Spanish Government for some losses.
Q. Is this an original paper?
A. It appears to be the original paper.

Q. In the form and marks bearing all of the original?
A. It appears to be with some exceptions.
Q. Is this paper in the form of a Spanish grant for lands?
A. It seems to be.
Q. The first contains the petition?
A. Yes; the first contains the petition.
Q. Then the references to the proper officers?
A. Reference to the proper officers.
Q. And apparently a decree being the grant of the land?
A. Yes, sir.
Q. You will please state whether this paper appears to be the original, or whether there are apparently changes and alterations made in it?
165 A. It appears to be the original, though some alterations have been made in the dates.
Q. Referring to the first eight pages of this document, please state what they purport to be.
A. They purport to be a petition from the firm of John Forbes & Company addressed to the captain-general, asking some compensation for losses.
Q. Referring to the eighth page of this document, state what it is. As I understand you, it is an order of the captain-general referring the petition of John Forbes & Company to the notaries.
A. Yes, sir.
Q. What dating does that bear?
A. January 5th, 1818.
Q. Referring to entry at page 8, please translate it into English.
A. This entry translated into English reads as follows: "January 7th of 1818. Taxes paid, 10 reals. Let this order be complied with." Signed by three notaries.
Q. Now, does there appear to be any alteration in the dates of those entries?
A. Yes, sir.
Q. Now explain that fully.
A. It appears to be before the date was changed (translated into English) reads: "February 14th, 1818."
Q. Please state in what manner the date appears to have been changed.
A. The alterations appear to have been made by writing the word "January" (in Spanish) over the word "February"—"Fev."
Q. What does that "Fev." mean in Spanish?
A. It means February.
Q. Is that the full word for February, or just an abbreviation?
166 A. No, sir; the abbreviation.
Q. And the attempt to make it what?
A. The attempt is to change it into "en."
(Objected to on the ground of form of question, asking the witness as to an attempt to change the document.)
Q. What does "en" mean?
A. "En" means abbreviation for January.
Q. Which would make it appear January 7th, instead of Feb. 14th?
A. Yes. The figure seven has been made over the original one. Next to this figure has been erased another one, which it appears to be a figure 4.

Q. State what is the character of the inks.

A. The ink used to make the alterations is of a lighter color than that used in the document.

Q. Do you find upon this document presented to you any other evidences of changes or alterations from the original? If so, please state.

A. Yes, sir; on the same page (9) the words "fourteenth of February" appear to be erased and over them has been written "seventh of January." On the 19th page there is another alteration which reads "Havana, January the 10th, 1818," written over the words "February twentieth," 1818. Page 27 appears to be written by other parties than pages 26 and 29, with which it is connected. The ink used for this page 27 is of a lighter color than that used in the whole document. The paper used seems to be different than the one used in the body of the document. On page 39, written over the word "March," appears the word "January," written with ink of a lighter color than the body of the document. At the bottom of page 29 and above the signature of the notary is written, in different characters and lighter ink, the following words, betwe'n lines: The tenth corrected "January. Good." That is all the
167 alterations I see in the document handed me by the defendant.

Q. Is there to that instrument any salvado before the signature to show that the alterations have been made?

A. No; except on the last page, and this regarding the January, which refers to the word "January" written over "March."

Q. That salvado related to what?

A. It relates to the testimony written on pages 26, 27, 28, and 29.

(Question objected to on the ground that the document itself is the best evidence and that it is the mere opinion of the witness.)

Q. Have you made a copy of that paper before you?

A. Not yet, sir.

Q. You are making it?

A. I am making one.

DEFENDANT'S COUNSEL. I will ask leave, when the copy which the witness has in preparation is completed, to have it substituted for the original grant and marked "Exhibit 3A."

(Adjourned until next Thursday morning at ten o'clock.)

168 In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AIS.
vs.
UNITED STATES.

Hearing resumed this 31st day of December, A. D. 1903.

Present: Honorable R. B. Archibald, special master, and counsel for the respective parties.

Cross-examination by counsel for complainant of defendant's witness, E. Carreras:

Q. State whether as Spanish consul or otherwise you had opportunity to examine and pass upon official papers emanating from any of the higher Spanish officials?

A. Yes, sir.

Q. Are you familiar with the practice of such officials in passing upon official papers and how they indicate their approval or disapproval?

A. Papers of the present day I am, but not of ancient papers.

Q. Have you had exhibited to you title papers to land emanating from the higher Spanish officials heretofore?

A. No, sir.

Q. Then this paper, defendant's Exhibit No. 3, is the first document relating to a grant of land that you have ever examined?

169 A. Yes, sir; the first.

Q. In official papers, such as I have described, is it customary to note approval of the several officials who pass upon the papers by anything besides a signature of the official?

A. It is customary to note such approval by a flourish following his signature.

Q. What is the Spanish word that describes the entire record of a grant of land beginning with the petition, including the grant, and ending with the order putting the party in possession?

A. "Expediente."

Q. You testified in your direct examination that the documents, Exhibit No. 3, were the original title papers?

A. It appears to be.

Q. Is this document, Exhibit No. 3, the expediente of a grant to John Forbes and Company?

A. Yes; it is.

Q. Turning to the first page of the document explain the printed words at the top of the page.

A. It is the official seal of the Spanish Government at that time.

Q. On the left-hand side, what is that seal?

A. That is the seal of the King Ferdinando Seventh.

Q. What does that seal upon the paper indicate?

A. That the paper is official.

170 Q. Can that paper be used by any other persons than the officials of the Spanish Government or by their authority?

A. Not that I know.

Q. Have you ever seen in your experience paper bearing the King's stamp used by any other person except the lawful authorities of the Spanish Government or some person by their consent?

A. No, sir.

Q. Examining again page one, state how many flourishes appear at the top of the page?

A. Four flourishes.

Q. Explain what those flourishes mean?

A. They mean the rubric that follows the signature of the Spanish official who sign the document or otherwise.

Q. Examining the first of those flourishes, is that the flourish of any party who signed that document?

A. No, sir; not the first.

Q. How then do you account for the first flourish?

A. I could not say.

Q. Does not that mean that some other official of the Spanish Government besides the parties who signed the document has inspected and passed upon the document?

A. I suppose so.

Q. State upon what you base that supposition, your knowledge
171 of such cases. Have you had such experience with Spanish documents as to enable you to state on what you base this supposition?

A. I have no experience on this particular question.

(Colonel Howard, of counsel for defendant, objected upon the ground that it was not competent cross-examination.)

Q. Taking the other three flourishes that appear on the top of this paper, are they the flourishes of parties who signed the document?

A. The second appears to be the same flourish of Ramirez; the third I find in the body of the document; the fourth is similar to the rubric of Migl. Mendez.

Q. All the papers comprising this expediente are attached together, are they?

A. Yes, sir.

Q. And all form one document?

A. Yes, sir.

Q. Are the pages numbered?

A. No.

Q. Counting the pages and each side of the leaf, upon page seven, what ends page seven?

A. The name of the petitioners.

Q. And anything else?

A. And their rubric.

Q. What are the names, then?

172 A. Don Pedro Anto de Ayala; the other, Juan Forbes.

Q. How many double sheets of paper are embraced in these eight pages?

A. I can not answer that question, as I find the sheets to be abraded by handling and age.

Q. To the end of page seven, do you find any irregularities or alterations in the paper?

A. There doesn't appear to be any.

Q. What appears upon the back of page seven, beginning with the first?

A. It is an order to the assessor-general.

Q. Who makes that order to the assessor-general?

A. By Ciefnuego.

Q. Who was Cienfuego?

A. The captain-general.

Q. Has it also another signature?

A. Yes; Migl. Mendez.

Q. Who was Migl. Mendez?

A. An escrebano, or notary.

Q. That order bears what date?

A. January 5th, 1818.

Q. Has that date been altered?

A. It does not appear to be.

173 Q. Then including the order to the assessor-general and the petition, both appear to be intact and perfect?

A. Yes, sir.

Q. What is the next endorsement on the back of page seven?

A. A certificate from the Escrebano Mendez that he made this order known to Juan Forbes.

Q. Is that in proper form?

A. I think so.

Q. What is the next order on the back of page seven?

A. This is an order that the information which the firm of Forbes and Company request be received by the Escrebano Mendez.

Q. Who is that signed by?

A. Signed by Cienfuego Del Monte and Migl. Mendez.

Q. Is that order complete without alteration?

A. Yes; it appears to be.

Q. What is the next endorsement on the back of page seven?

A. A certificate from the escribano to the effect that he communicated said order to Don Juan Forbes.

Q. Does this page seven bear the King's stamp and also the four rubrics of the various officers?

A. Yes, it bears the four rubrics.

Q. Is that proof that it is a genuine original document?

A. Yes.

174 Q. What is the order that begins page nine of the document?

A. The order is that the foregoing order be accomplished according to law.

Q. Who signs that order?

A. Ramirez, Campusano, Migl Mendez. At the margin of the page appears the signature of another man, P. M., to the effect that the taxes were paid.

Q. In your direct testimony you testified that page eight was an order to the notary. Was that correct?

A. There were two orders on this page, one to the assessor-general and one to the notary.

Q. Continuing further on page nine and following the order of Ramirez, Campusano, and Mendez, what is the paper writing on that page?

A. It is the beginning of taking of testimony under the foregoing orders by the escribano, Mendez.

Q. Is it written on the same page with the order of the Spanish official named immediately following?

A. Yes, sir.

Q. How many pages are occupied by the testimony taken by the notary?

A. Part of one page, nine full pages, and part of the eleventh page.

Q. Who was the last witness?

A. Franco de Pla Morales and followed by the notary's signature and flourish.

175 Q. What on this page follows the completion of the testimony as written on this page?

A. It is the order from General Cienfuegos that the grant be made to the petitioners.

Q. How many pages does that occupy?

A. It occupies three full pages, part of one at the beginning and part of one at the end.

Q. What is the endorsement made on the last page occupied by the grant?

A. This is a certificate of the notary that he communicated the said order to Don Colin Michel. Through this name a line crosses it and over this name is written Juan Forbes.

Q. Does this certificate that you have just testified to end all that appears on that page?

A. Yes.

Q. And is the reverse of that page blank?

A. Yes.

Q. Does it contain the King's seal and the rubrics and the official stamp of paper upon the reverse of this page?

A. Yes.

Q. What begins the next page following the grant?

A. It is a petition from the firm of John Forbes and Company signed by their representative, Colin Michel, requesting that two authenticated copies be given to them of the orginal act or dispatch which Joseph Masot, the civil and military commander of the Province of Florida, did dispatch in consequence of one sent to him by the superior gov-
176 ernment upon the indemnification of damages claimed by the petitioners.

Q. What is the Spanish word that you have translated as the second "dispatch?"

A. Le libro.

Q. What is the English translation of le libro?

A. Did dispatch, or gave.

Q. Does that petition cover all the page?

A. One page; yes.

Q. In the right-hand margin of this page what order is made?

A. Let this be carried to the assessor. Signed, General Cienfuegos.

Q. On the back of the page, what is the first order appearing on the top of the page?

A. It is an order from the Spanish general that the two copies be furnished to the house of Forbes and Company.

Q. Is the endorsement on it in reference to the payment of a tax?

A. Yes.

Q. What is the next order on the back of the page?

A. It is a certificate from the escribano that he communicated the foregoing order to Don Colin Michel.

Q. The two orders last referred to, how much of the page do they occupy?

A. One-half the page.

177 Q. What follows on the lower half of this page?

A. It is the beginning of a copy of an order fro[illegible] Colonel Masot, civil and military commandant of the Province of Fl[illegible]te., putting in possession of the firm of Juan Forbes and Compan[illegible] the land requested.

Q. Please examine the paper and see if it is the land requested or the land granted by the superior decree of the captain-general.

A. Of the land granted by the superior decree of the captain-general.

Q. In your direct examination you stated that page twenty-seven

appeared to be written by another party than who wrote pages twenty-six and twenty-nine with which it is connected, and that the ink used on page twenty seven was lighter in color, etc.; please examine pages twenty-six and twenty-seven, and state wherein the writing in its characters on page twenty-seven differs from the writing on page twenty-six.

A. The character is stronger on page twenty-seven than in page twenty-six; the "R" used in the writing of page twenty-seven, it differs in the shape of the "R" used in page twenty-six. There are many other differences in the body of page twenty-seven compared with the body of page twenty-six.

Q. What pages of this document are embraced in the copy of the order of Commandante Massot?

A. The lower half of page twenty-six, full pages twenty-seven and twenty-eight, and three-quarters of page twenty-nine.

178 Q. How is the copy of the order of the Commandante Massot certified?

A. It is certified by the Escribano Mendez as being a copy of the original order.

Q. Whereabouts does that certificate appear?

A. In the lower part of page twenty-nine.

Q. What follows that certificate, beginning on page twenty-nine and continuing on page thirty?

A. It is certificate from three other escribanos of the Royal College of Havana to the effect that Don Migl Mendez is also an ascribano or notary of His Majesty, dated Havana, December 19th of 1818.

Q. This certificate is partly on pages twenty-nine and thirty, which is the last page of the document, and all together form the expediente?

A. Yes.

Q. Does it contain anything further to verify it?

A. There is a seal bearing the Spanish court of arms, and it is the seal of the Royal College of Notaries and Escribanos of Havana.

Q. You testified in your direct examination that there was a salvado upon the document. What is the definition in English of the word salvado?

A. Corrected.

Q. What is a salvado upon an official paper?

A. It means that it is a certificate of alterations or corrections that have been made in the paper.

179 Q. What are the Spanish words appearing on this document constituting the salvado?

A. Testado, # ingenieros, sign no vale entre, # reng^{s} á dies, # em^{do} enero, # vale.

Q. In your direct examination you omitted to translate the first words testado, ingenieros; sign no vale. Please translate those words.

A. Testado means certified.

Q. Following the word testado, the words ingenieros; sign no vale mean what?

A. That the word ingenieros has been written by mistake.

Q. Following testado, are the abbreviations for the words entre renglones, are they not?

A. Yes.

Q. Do not the two words entres renglones when used upon an official document constitute what is called in English an idiom having a special signification, meaning interlineation noted?

A. Yes.

Q. Then the correct translation of the words in this document, entres renglones á dies emendo should be translated correctly, how?

A. An interlineation in the tenth line corrected.

Q. Doesn't it mean corrected to the tenth?

A. Corrected to the tenth. It means between lines to tenth corrected January, good.

Q. Then it does mean corrected in the tenth line?

180 A. No, sir.

Q. If it was translated corrected in the tenth line, such translation would be wrong?

A. Yes; upon the ground that on the tenth line of page twenty-ninth there is no correction whatever. Correction is made on the ninth line with three words. Upon the word "veinte" is written "y tres" following the word "de" and the word "enero" is written over the word "marzo." The salvado states that the word "enero" is properly inserted.

Q. In your direct testimony you say that at the bottom of page twenty-nine above the sigature of the notary in different character and in lighter ink appears the salvado?

A. Yes, sir.

Q. Have you ever translated the words entre renglones á dies em^{do} enero, vale, corrected between the lines corrected to January tenth, good?

A. Yes; but I was not presented at the time the original document.

Q. Were you presented with the words printed in type?

A. Yes.

Q. You were presented with the same words which appear in the original document, were you not?

A. I was presented with simply those words to translate them without showing the original document in which the correction is made.

Q. Examining this original document as to the color of the ink in which the word enero in the ninth and tenth line is written, with

181 the color of the ink in the last line of the salvado, state whether or not they appear to be of the same color.

A. It does appear to be of the same color.

Redirect examination by Mr. LEWIS, of counsel for the defendant:

Q. You have stated that the salvado is written with an ink of a lighter color than that in the body of the document; please refer again to the salvado and state whether the entire salvado is a different ink or only a part of it.

A. Upon examination of the document, I find that only a part of the salvado, which is the last line, is the one written with a lighter color of ink and different handwriting than the body of the document.

Q. Please state what that last line translated into English is.

(Question objected to by counsel for complainant on the ground that he has already translated it twice, once on the direct and once on the cross examination.)

A. Between lines to tenth corrected January, good.

Mr. S. E. CARRERAS recalled for defendant.

Direct examination by Colonel HOWARD, of counsel for the defendant:

Q. Examine the paper handed you and state whether you have compared it with the grant, Exhibit No. 3, heretofore testified about by you, and whether it is a correct translation thereof.

182 A. It is.

(Defendant's counsel offers paper, stating: I now offer the paper which is marked "Exhibit No. 3 A."

The same objections by complainant's counsel as were made to defendant's Exhibit No. 3.)

Cross-examination by COUNSEL FOR COMPLAINANT:

Q. This translation which you have verified as correct omits entirely the copy of the King's seal and the rubrics and the printed certificate verifying the official paper, does it not?

A. It does.

Q. It does not attempt to follow the paging?

A. No; it does not attempt to follow.

(The defendant now offers a literal copy of the original grant and the same objections are made by complainant's counsel that were made to the offer of defendant's Exhibit No. 3. It is received and marked "Exhibit No. 3 A;" and then defendant rests.)

183 In the United States District Court, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

The hearing and taking of testimony being resumed on this, the 8th day of March, A. D. 1904, there being present counsel for the complainants and also for the defendant, the defendant offered in evidence a certified copy of commission dated April 3rd, 1829, from the President of the United States to R. K. Call, esq., of Florida, as commissary to the United States to receive the archives and documents which relate directly to the sovereignty and property of the provinces of East and West Florida, filed in evidence and marked "Exhibit 7."

The defendant offered in evidence certified copies of letters from R. K. Call to the Commissioner of the General Land Office, dated Washington, March 30th, 1829, Tallahassee, 28th Oct., 1829, Tallahassee, June 2nd, 1829, Havana, 18th Jan., 1830, Tallahassee, 26th July, 1829, Tallahassee, 20th March, 1830, Tallahassee, 4th Aug., 1829, Tallahassee, 3rd May, 1830, Washington, 13th March, 1831, all relating to his acts done in pursuance of his commission as shown by Exhibit No. 7.

(The above testimony (letters of R. K. Call) objected to by complainant's counsel on the ground that they are the statements of a stranger and res inter alios acts, in this suit, and as to a portion of those letters, they are the expression of a conclusion on the part of the writer and a statement of a party without the sanction of an oath and not subject to cross-examination.)

Letters of R. K. Call filed in evidence attached together and marked "Exhibit No. 8."

Defendant's counsel announced that they rested.

184 IN REBUTTAL.

Complainants in rebuttal: The defendants having offered in evidence a certain portion of the record in the trial in the Superior Court for the Western District of Florida, complainants now offer such further parts of said records of said Superior Court as are material in this case, which are all by certified copies certified to by the clerk of the court of Escambia County, who is the custodian of said records. To each one of these papers in the Spanish language so certified there is a translation into the English language and sworn to by a translator, and by agreement of counsel further pro'ff that the same are true translations is waived, as follows:

Certified copy of a letter in the Spanish language from the captain-general of Cuba to R. K. Call, dated March 4th, 1830, and a translation of the same attached, marked "Exhibit O;" letters from R. K. Call to said captain-general, dated February 16th, 1830, duly certified, marked "Exhibit P;" also certified copy of a petition of John and James Innerarity for the issuance of a subpœna duces tecum to R. K. Call, and the order of Judge Breckenridge, dated August 2nd, 1830, that the writ do issue, marked "Exhibit Q."

Also certified copy of petition of James and John Innerarity that the *the* clerk of the Superior Court of Leon County furnish copies of official letters and documents from the files of that court. Filed on evidence and marked "Exhibit R."

Also certified copy of consent of counsel to let depositions of witnesses be taken by Fry and Debloise, commissioners, marked "Exhibit S."

185 Also certified copies of the depositions of Jose y Crusat, John Brosnaham, and Joseph E. Caro. Filed in evidence and marked "Exhibit T."

Also certified copy of an affidavit of John Innerarity of the loss of the original exemplification of the grant to John Forbes of lands between the Apalachicola and Choctawhatchie rivers. Filed in evidence and marked "Exhibit U."

Also certified copy of an official copy of the grant to John Forbes and Company and certified to by Gabriel Rameras, notary, on 23rd of June, 1824, in Spanish, with a certificate of the captain-general, dated 11th of February, 1829; also in Spanish with a translation into Engish attached. Filed in evidence and marked "Exhibit V."

Also certified copy of petition to the governor of Florida, dated 27th of March, 1819, by John Innerarity, asking order of ejectment against certain trespassers on his lands between the Apalachicolan and Choctawhatchie rivers, with orders issued thereon, and the order of ejectment of Gov. Callova, dated Oct. 7th, 1819. Filed in evidence and marked "Exhibit W."

Also certified copy of an official copy of the ejectment order of Gov.

Callova, dated 8th day of October, 1819, official copy certified to Oct. 22nd, 1819. Filed in evidence and marked "Exhibit X."

Respectfully submitted.

R. B. ARCHIBALD,
Special Master.

(The foregoing is endorsed as follows:) "# 210. P. 225. L. I. In United States District Court. Southern District of Florida. Theodore Dalcour et al. vs. The United States. Report of special master. Filed Mar. 17, 1904. E. O. Locke, clerk."

186 (From the minutes of the District Court of the United States for the Southern District of Florida. Adjourned term Tuesday, May 24th, 1904. Page 148.)

Present: Hon. James W. Locke, district judge.

Marshal, clerk, crier and bailiffs in attendance. Ordered, that court be opened.

Whereupon court is opened by due proclamation.

* * * * * * *

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

This cause is argued.

* * * * * * *

Ordered, that court adjourn for one day.

Whereupon court is adjourned as ordered.

Attest:

E. O. LOCKE, *Clerk.*

187 United States District Court, Southern District of Florida.

THEODORE DALCOUR ET AL.
against
THE UNITED STATES.

All evidence for both parties having been taken and the cause coming on for final hearing, the petitioners move the court for leave to amend their petition so that it shall allege that the petitioners rely upon the title evidenced by the registro, or original title papers introduced by the defendant, which proposed amendment is herewith submitted.

W. W. DEWHURST,
BLOUNT & BLOUNT,
Solicitors for Petitioners.

This amendment is permitted as prayed, by consent.
May 25th, 1904.

JAMES W. LOCKE, *Judge.*

(The foregoing has the following indorsements:) "210. P. 224. L. 1. District Court of United States, Southern District of Florida. Theodore Dalcour et al. vs. United States of America. Filed May 25th, 1904. E. O. Locke, clerk. Motion to amend petition. Order."

188 *Amendment to petition.*

In District Court of the United States, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

All the evidence in this case on behalf of both parties, being introduced and the cause coming on for final hearing, the petitioners amend their petition by adding to the petition, immediately before the prayer for relief therein, the words following, to wit:

"That the grant (heretofore correctly described in this petition except as to date) to the lands described in this petition and to which petitioners claim title, and upon which they rely was made by the captain-general of Cuba on February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818."

BLOUNT & BLOUNT,
W. W. DEWHURST,
Solrs. for Petitioners.

(The foregoing is endorsed as follows:) "# 210. P. 225. L. 1. U. S. District Court, Southern District of Florida. T. Dalcour et al. vs. United States. Amendment to petition. Filed May 25, 1904. E. O. Locke, clerk."

189 In the District Court of the United States for the Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

Motion.

Now comes the defendant and move the court for leave to withdraw the consent, appearing of record, to the filing of the amendment to the amended bill herein, on the 25th day of May, 1904, upon the ground that the said consent was agreed to and entered into by mistake.

J. N. STRIPLING,
United States Attorney.
ROBERT A. HOWARD,
U. S. Special Attorney.

(The foregoing has the following endorsement:) "210. 225 L. 1. U. S. District Court, Southern District of Florida. Theodore Dalcour et al. vs. The United States. Motion to withdraw consent. Filed July 6, 1904. E. O. Locke, clerk."

190 In the District Court of the United States, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
UNITED STATES.

In the above stated cause, counsel for defendant having represented to the court that his consent to the amendment filed herein on the 25th day of May, A. D. 1904, whereby the complainant relies upon the registro as muniment of title, and counsel for defendant now representing that such consent was made inadvertently and desiring to withdraw the same, it is hereby ordered upon consent of the parties, complainants and defendant, that such consent be withdrawn, and that the application to amend be submitted to the court.

Done and ordered this 6th day of July, A. D. 1904.

JAMES W. LOCKE, *Judge.*

(The foregoing has the following endorsement:) "210/225. L. 1. U. S. District Court, Southern District of Florida. Theodore Dalcour et al. vs. the United States. Order allowing withdrawal of consent. Filed Jul. 6, 1904. E. O. Locke, clerk."

191 *Decree.*

In the District Court of the United States in and for the Southern District of Florida.

THEODORE DALCOUR & OTHERS, HEIRS of John Forbes, deceased, Fanny W. J. Innerarity and others, descendants and heirs of James Innerarity, and Victoria Innerarity & others, descendants and heirs of John Innerarity,
vs.
THE UNITED STATES.

This cause coming on to be heard at this term upon the petitions, answer, replication, and proof, and after argument of counsel, has been taken under advisement by the court.

Whereupon the law and the evidence being duly considered, it is now ordered, adjudged, and decreed that the grant by Cienfuegos, the captain-general of Cuba, to John Forbes & Company, made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for a tract of land in West Florida, commencing on the Appalachicola River at a point opposite the mouth of Sweetwater Creek, running thence due west to the River Choctawhatchee, thence following the course of said river to its mouth on the Bay of St. Rosa, thence easterly, winding along the shores of said bay and the sea to the lands granted to the firm of Forbes and Company by the Indians, running thence along the western boundary of said lands up the Appalachicola River to the point of beginning, is a valid, just, and binding title against the United States.

It having been admitted on the pleadings in this cause that the petitioners herein are the heirs and legal representatives of John Forbes, James Innerarity, and John Innerarity, to whom, under the firm name of John Forbes and Company, said grant was made, and an order herein having been made on the 5th day of July, A. D. 1902, that the survivors of the persons named in the original amended petitions, to wit, Theodore Dalcour, Stephen Tennant, Henrietta Tennant, Blanch Bruce,
192 and her husband Robert Bruce, Jules Fontena, Leocadie Morrison, formerly Leocadie Tennant, Helen Durcos, and her husband Marcal Drucos, Louise M. Innerarity, Emanuel Innerarity, Margaret Hiern, and her husband Charles H. Hiern, James I. Innerarity, Fanny Wycoff, and her husband Cornelius Wycoff, Eloisa Wilson, and her husband John Wilson, Albert H. W. Innerarity, Elixa Z. Boggs, and her husband R. N. Boggs, Eliza Minor, Harriet Deschappelles, and her husband E Le Breton Deschappelles, Eliza M. Barton, Eliza Melanie Innerarity, John Hulse, Victoria Hulse, and Emma Taylor, should thereafter prosecute the suit herein for the benefit of all persons lawfully claiming said tract of land under the said John Forbes, James Innerarity, and John Innerarity, according to their respective interests, and that if any one or more of said above-named persons so authorized to prosecute should have become deceased before the final determination of this cause, it should proceed in the name of said above-named persons; it having been suggested to the court that Theodore Dalcour, one of the persons above named ordered to prosecute by said interlocutory order and decree, dated July 5th, 1902, is now dead, it is further ordered, adjudged, and decreed that said Stephen Tennant, Henrietta Tennant, Blanch Bruce, Jules Fontena, Leocadie Morrison, Helen Drucos, Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, James I. Innerarity, Fanny Wycoff, Eloise Wilson, and her husband John Wilson, Albert H. W. Innerarity, Elixa Z. Boggs, Eliza Minor, Harriet Deschappelles, and her husband E. Le Breton Deschappelles, Eliza M. Barton, Eliza Melanie Innerarity, John Hulse, Victoria Hulse, and Emma Taylor, or such of them as are now living, are entitled to receive from the United States a patent for all the above-described tract of land not sold or otherwise disposed of by the United States, and entitled to enter any of the public lands of the United States liable to private entry, at one dollar and a quarter per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the above-described tract so granted to John Forbes and Company, according to the 6th section of the act of Congress approved June 22nd, 1860.

It is further ordered, adjudged, and decreed that said Stephen
193 Tennant, Henrietta Tennant, Blanch Bruce, Jules Fontena, Leocadie Morrison, Helen Drucos, Louis M. Innerarity, Emanuel Innerrarity, Margaret Hiern, James I. Innerarity, Fannie Wycoff, Eloisa Wilson, and her husband John Wilson, Albert H. W. Innerarity, Eliza Z. Boggs, Eliza Minor, Harriet Deschappelles, and her husband E. Le Breton Deschappelles, Eliza M. Barton, Eliza Melanie Innerarity, John Hulse, Victoria Hulse, and Emma Taylor, and such of them as are now living, and the survivors of them, shall hold the said lands patented hereunder and said rights to enter under this decree for the use and benefit of the legal representatives of said John Forbes, James Innerarity, and John Innerarity.

It is further ordered, adjudged, and decreed that R. B. Archibalds, esq., be, and he is hereby, appointed special master in this cause to ascertain and report to this court, according to the United States surveys thereof, the lands within the boundaries of said grant to John Forbes & Company herein and hereby confirmed, yet unsold by the United States, and the area according to said surveys of the lands in said grant that have been sold by the United States.

Done and ordered in open court this the 5th day of December, A. D. 1904.

JAMES W. LOCKE, *Judge.*

(Endorsed:) "#210, p. 225. L. 1. U. S. District Court Southern District of Florida. Theodore Dalcour et al. vs. The United States. Final decree. Filed Dec. 5th, 1904. E. O. Locke, clerk. Ent. in O Book, p. 82."

194 *Suggestion of diminution.*

In the District Court of the United States Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

Now comes the defendant, the United States, and suggests to the court that whereas it appears from the record that at the hearing of this cause on the 25th day of May, 1904, the petitioners asked leave to amend their petition by adding to the petition, immediately before the prayer for relief therein, the words following, to wit:

"That the grant (hereinbefore correctly described except as to date) to the lands described in this petition and to which petitioners claim title and upon which they rely, was made by the captain-general of Cuba on February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818."

And whereas it appears that this amendment was permitted as prayed for by consent, and that this consent of counsel to this amendment having been made by inadvertence and mistake, the same was by consent, on the 6th day of July, 1904, withdrawn and the amendment submitted to the court.

And whereas at the argument of the cause the amendment was treated as having been allowed, and the defendant in reply thereto claimed that the said amendment set up a new and different cause of action from that asserted in the original petition herein, in that the claimant now
195 claimed under a grant alleged to have been made to John Forbes and Company by the captain-general of Cuba on the 20th day of February, 1818, whereas in and by the original petition the claimant claimed under a grant made on the 10th day of January, 1818, and that the said cause of action is barred by not having been brought within the limitations of the act of 1860, extended by the act of 1872; and further in reply denied that a grant of the land mentioned in said petition was made by the captain-general of Cuba to John Forbes and Company on the 20th

day of February, 1818; and further in reply claimed that if a grant for the land mentioned in these proceedings was made by the captain-general of Cuba, as alleged, on the said 20th day of February, 1818, the said alleged grant was made after the 24th day of January, 1818, and was declared and agreed to be null and void by the terms of Article VIII of the treaty of the United States of America and the King of Spain on the 22nd of February, 1819.

Now the defendant suggests that an order be made nunc pro tunc that said amendment was allowed by the court, and that the defendant be permitted to file its answer to said amended petition setting up said defenses as hereinbefore stated, nunc pro tunc.

J. N. STRIPLING,
U. S. Attorney.

(The foregoing is endorsed as follows:) "# 210. Pg. 225. L. 1. U. S. District Court Southern District of Florida. Theodore Dalcour et al. vs. The United States. Suggestion of diminution. Filed Mar. 16, 1905, as of July 7th, 1904. E. C. Locke, clerk."

196 (From the minutes of the stated term in the District Court of the United States, in and for the Southern District of Florida, Thursday, March 16, 1905, page 275, book D.)

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES OF AMERICA.

Suggestion of diminution of the record herein being filed and counsel for both plaintiff and defendant being present and argument had, upon consideration thereof it is ordered, as follows, viz:

Now, at this term of the court, in open court, came the United States, by J. N. Stripling, esqr., district attorney, and calls the attention of the court to the fact that the record in this cause fails to show that the proposed amendment to the petition offered by the petitioners at the hearing on the 25th day of May, A. D. 1904, was acted upon, and said amendment prayed for was made therein; now, after argument of counsel for petitioners, and on behalf of the United States, it is ordered that the amendment to the original petition herein is hereby allowed, and it be amended by adding thereto, immediately before the prayer therein, the following words, to wit: "That the grant (heretofore correctly described except as to date) to the lands described in the petition, and to which petitioners claim title, and upon which they rely, was made by the captain-general of Cuba, February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818." It is further ordered, upon motion of the United States, that the answer of the United States to said amended petition here presented be permitted to be filed.

It is further ordered and decreed that said orders be made in said cause nunc pro tunc, as of the 7th day of July, A. D. 1904.

Done and ordered in open court this 16th day of March, A. D. 1905.

JAMES W. LOCKE, *Judge.*

The petitioners, by their counsel, except to that part of said order
197 wherein the United States are allowed to file an additional answer nunc pro tunc, and the filing of such answer.

JAMES W. LOCKE, *Judge.*

And the additional answer aforesaid is filed herein as of July 7th, A. D. 1904.

Ordered, that court adjourn for one day. Whereupon court is adjourned as ordered.

Attest:

E. O. LOCKE, *Clerk.*

198 *Additional answer to amended petition.*

In the District Court of the United States Southern District of Florida.

DALCOUR ET AL
vs.
THE UNITED STATES.

Now come the defendant, and for additional answer to the petition herein, as amended, says that the said amendment asserts and sets up a new and different cause of action from that asserted in the original petition herein, in that the claimant now claims under a grant alleged to have been made to John Forbes and Company, by the captain-general of Cuba, on the 20th day of February, 1818, whereas, in and by the original petition the claimant claimed under a grant made on the 10th day of January, 1818; and the defendant says that the said due cause of action is barred by not having been brought within the limitation of the act of 1860 and extended by the act of 1872.

And defendant further says, that it denies that a grant of the land mentioned in said petition was made by the captain-general of Cuba to John Forbes and Company on the 20th day February, 1818, as is alleged in said amendment.

And defendant says, that if a grant for the lands mentioned in these proceedings was made by the captain-general of Cuba, as alleged, on the 20th day of February, 1818, the said alleged grant was made after the 24th day of January, 1818, and was declared and agreed to be null and void by the terms of Article VIII of the treaty between the United States of America and the King of Spain on the 22nd day of February, 1819.

J. N. STRIPLING,
U. S. Attorney.

(The foregoing has the following endorsement:) "# 210. Pg. 225. L. 1. U. S. District Court Southern District of Florida. Theodore Dalcour et al. vs. The United States. Additional answer to amended petition. Filed Mar. 16, 1905, as of July 7th, 1904. E. O. Locke, clerk."

199 *Report of master as to lands sold and unsold.*

In the District Court of the United States in and for the Southern District of Florida.

THEODORE DALCOUR AND OTHERS, HEIRS OF JOHN Forbes, deceased, Fanny W. J. Innerarity and others, descendants and heirs of James Innerarity and Victoria Innerarity and others, descendants and heirs of James Innerarity,

vs.

THE UNITED STATES OF AMERICA.

To the Honorable JAMES W. LOCKE, *Judge of said Court.*

I have the honor to report that under and by virtue of the order of this honorable court, dated December 5th, 1904, wherein I was appointed special master in the above-entitled cause and directed to "ascertain and report to this court, according to the United States surveys thereof, the lands within the boundaries of the grant to John Forbes and Company, yet unsold by the United States, and the area, according to said surveys of the lands in said grant that have been sold by the United States," I have taken testimony in regard to said matters, the only witness introduced being J. M. Dell, land clerk for the State of Florida, for detai ed work for the United States, whose testimony is hereto attached, marked "Exhibit A;" said witness produced the list of lands sold and disposed of alleged to be within the boundaries of said grant to John Forbes, which list is hereto attached.

From said testimony I ascertain and report that of said lands within said grant there remains undisposed of (9,681.49) acres and more particularly described as follows, to wit:

(Here follows a statement by section, township, and range of the lands not disposed of, in terms set out in the decree herein dated April 8th, 1905, 12 pages; and omitted here, by agreement of counsel.)

200 * * * * * * *

And I do further find and so report that within the boundaries of said grant, according to said surveys, there are 1,190,495.45 acres which have been sold by the United States.

Respectfully submitted.

R. B. ARCHIBALD, *Special Master.*

March 17th, 1905.

201 EXHIBIT A.

In United States District Court, Southern District of Florida.

THEODORE DALCOUR ET AL.

vs.

THE UNITED STATES.

Testimony taken by order of the court March 3d, 1905; counsel for the complainants and for the United States being present.

Present: R. B. Archibald, special master, W. W. Dewhurst, J. N. Stripling, and Robt. A. Howard.

J. M. DELL, being duly sworn, deposes and says:

My name is J. M. Dell; I reside in Gainesville, Florida; I am 57 years of age, and I am land clerk for the State of Florida, for detail work for the United States land office at Gainesville, Florida.

By Mr. DEWHURST, for complainant's solicitor:

Question. Please examine complainant's "Exhibit D," the township maps of township one N. of R. seven west and township 2 north of ranges 7 & 8 west in connection with complainant's "Exhibit L," sectional map of the western part of Florida, and state whether a line drawn due west from a point opposite the mouth of Sweet Water Creek to the Chocathatchee River will include all of township 1 north of ranges 8 to 17, inclusive, west,

T. 1 S., rgs. 8 to 17, inclusive, west.
T. 2 S., rgs. 8 to 22, " "
T. 3 S., " " 20, " "
T. 4 S., " 9 15, " "
T. 5 S., " 8 14, " "
T. 6 S., " 8 13, " "
T. 7 S., " 8 12, " "
T. 8 S., " 8 11, " "
T. 9 S., " 7 11, " "

202 according to the U. S. public surveys and the plats thereof in the United States land office at Gainesville, Florida.

Answer by J. M. DELL. It does, with the exception of township 1 west of range 17, and little in T. 1 north 16 west; also, all in T. 2 rgs. 18 to 22 north of the Choctawhatchee River.

Have you lately made a written statement of the lands within the townships and ranges set out in the last interrogatory which lie east of the Choctawhatchee River according to the plats on file in the U. S. land office at Gainesville, Fla., describing, according to the U. S. surveys, the lands in such townships still undisposed of by the U. S., and area of those which have been disposed of?

Ans. I have.

(Witness handed written statement purporting to be the statement set forth in the last interrogatory and say whether or not that is the statement referred to in your last answer.)

Ans. It is.

Ques. Was that statement made from the township plats in the U. S. land office, by you, and does it correctly show the lands designated upon such plats as undisposed of?

Ans. It does.

Ques. Please state how you arrived at the area of the lands disposed of as the same appears in this statement.

Ans. By subtracting the undisposed-of area from the total area.

Ques. Is this wholly in your handwriting and made wholly by you?

Ans. It is.

Ques. I find in your statement you have included certain lands in sections 4 and 5 of T. 2 S., R. 28 west; are those lands embraced within the boundaries of the lands decreed to have been granted to John Forbes & Company, the language of the decree being, "commencing on the

Apalachicola River at a point opposite the mouth of Sweet Water Creek, running thence due west to the river Choctawhatchee and from thence following the waterways back to the point of beginning?"

Ans. Yes; they are embraced in that description.

203 Ques. Are the disposed of lands, as shown by your statement of T. 2 S., R. 23 west, lands which lie east of the Chactawhatchee Bay in said township?

Ans. Yes, sir.

(Complainant offers in evidence the statement compiled in the land office in Gainesville, by the witness, as to the undisposed of lands and the area of the lands disposed of in that part of the tract of land decreed to have been granted to John Forbes & Company, by a decree of this court dated Dec. 5, 1904, embraced within the townships and ranges as shown by said statement.

Defendant's counsel objects to this testimony because the lands mentioned in said statement are not properly and sufficiently brought within the lines and descriptions of the grant to John Forbes & Co., as set out in the petition.)

Ques. Will you examine again complainant's "Exhibit D," and state whether a line drawn due west from the Apalachicola River to the Chactawhatchee River beginning at a point at the mouth of Sweet Water Creek would embrace any other lands besides those contained in the statement just offered in evidence?

Ans. Yes, sir; it would embrace the southern parts of sections 31 to 36, inclusive, in township 2, N., R. 8, 9, 10, 11, 12, 13, 14, 15, 16, and part of sec. 32 in 17.

Ques. (By deft.) Would a line projecting from a point on the Apalachicola River opposite Sweet Water, on the map of the U. S. survey, coincide exactly with sectional lines?

Ans. I could not say.

Ques. (By deft.) You can not definitely state by sec. lines the northern boundary of that grant?

Ans. No, sir; I can not.

Ques. (By deft.) Do you know from your examination whether there ever was any survey of the lands embraced in the description in that grant?

204 (Objected to as immaterial by complainant's counsel.)

Ans. I have never seen any evidence of it.

Ques. (By deft.) Would a description of land as bounded upon the west by the river Perdido, on the north by the boundary line of the U. S., having its eastern limit where the St. John's River empties into the Atlantic Ocean, and for its southern boundary the Gulf of Mexico, include all the lands about which you have testified this morning?

(Objected to as irrelevant and immaterial, and not within the scope of the reference made in the decree or any order of reference.)

Ans. Yes, sir.

Ques. (By compl's counsel.) Please state if within the exterior lines of the lands embraced in your statement there are included lands still unsurveyed.

Ans. Yes, sir.

Ques. State if there exists in the land office any plats of the lands in township 9 S., R. 9.

Ans. None that I could find.

Ques. Has there been allowed at the Gainesville land office homestead entries within the townships embraced in your statement which you have considered as lands disposed of but which have not been proved up?

Ans; Yes; a considerable area.

Ques. Is there also a considerable area within the same townships selected by the State under the swamp-land act and not yet approved which you have in your statement—you have included in the area of the lands disposed of?

Ans. There is.

J. M. DELL.

Subscribed and sworn to before me this 3d day of March, A. D. 1905.

R. B. ARCHIBALD, *Special Master.*

205 (Here follows 82 sheets, each setting out the lands in a particular township disposed of, as reported by the master, by section, township, and range, as set out in the decree herein dated April 8th, 1905; also the total area of each township, and the area therein disposed of by the United States, all of said sheets covering the townships as follows):

T. 1 N., ranges 8 to 16 W., inclusive.
T. 1 S., ranges 8 to 17 W., inclusive.
T. 2 S., ranges 8 to 23 " "
T. 3 S., ranges 8 to 20 " "
T. 4 S., " 9 to 16 " "
T. 5 S., " 8 to 14 " "
T. 6 S., " 8 to 13 " "
T. 7 S., " 8 to 12 " "
T. 8 S., " 8 to 12 " "
T. 9 S., " 9 to 12 " "

* * * * * * *

234 *Exceptions to master's report*

In the District Court of the United States. Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

Now comes the defendant, the United States, by J. N. Stripling, U. S. district attorney, and files this, its exceptions to the report of the special master herein, filed on the 17th day of March, 1905, and for ground of exceptions says:

1. That the special master erred in finding and reporting that of the said lands within said grant there remained undisposed of, 79,613.74/100 acres, and that 1,190,495.43 acres have been disposed of by the United States, because the lands stated and reported according to United States surveys are not shown to be within the boundaries of the grant made to John Forbes & Company, stated in said decree herein of December 5, 1904.

THE UNITED STATES,
By J. N. STRIPLING,
U. S. District Attorney.

(The foregoing has the following endorsement:) "No. 210. Pg. 225. L. 1. U. S. District Court, Southern District of Florida. Theodore Dalcour et al. vs. The United States. Exceptions to the master's report, as to lands undisposed of and disposed of. Filed Mar. 18, 1905. E. O. Locke, clerk."

235 *Motion and order that original grant be transferred to clerk of Supreme Court.*

In the District Court of the United States. Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES.

Now comes the United States, defendant in the above cause, and moves the court in whose safe-keeping is now the original grant from the captain-general of Cuba to John Forbes & Company, which was in the custody of the clerk of the Circuit Court of Escambia County, Florida, introduced in evidence by the said defendant at the hearing of said cause, be transmitted to the clerk of the Supreme Court of the United States with the transcript of the proceedings upon the appeal herein, for the inspection of the Supreme Court; the said original grant to be returned to this court after the disposition of the cause by the Supreme Court for delivery to the lawful custidian thereof.

J. N. STRIPLING,
U. S. District Attorney.

Upon reading and considering the foregoing motion it is ordered that said motion be allowed and that such original grant be transmitted to the clerk of the Supreme Court, with the transcript of the proceedings herein.

JAMES W. LOCKE, *Judge.*

(The foregoing has the following endorsements:) "Dalcour et al. vs. The United States. Motion to transmit and order to transmit original grant with transcript to the Supreme Court. Filed Mar. 18, 1905. E. O. Locke, clerk. Ent. on Min., pg. 275."

236 *Replication to amended answer.*

In the District of the United States for the Southern District of Florida.

DALCOUR ET AL.
vs.
THE UNITED STATES.

The replication of Stephen Tennant, Henrietta Tennant, Blanch Bruce, Jules Fontena, Leocadie Morrison, Helen Drucos, Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, Fanny Wykoff, James I. Innerarity, Eloise Wilson, her husband, John Wilson; Albert H. W. Innerarity, Eliza Z. Boggs, Elizor Minor, Harriet Deschappelles, her husband, E. le Breton Deschappelles; Eliza M. Barton, Eliza Melanie Innerarity, John

Hulse, Victoria Hulse, and Emma Taylor, survivors of the petitioners, on behalf of themselves and all others interested to the additional answer of the United States filed herein nonc pro tunc as of the 7th day of July, 1904.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception which may be had to the manifold errors, uncertainties, and insufficiencies of the said additional answer of the United States for replication thereto, do say that they do and ever will aver, maintain, and prove said amended bill to be true, certain, and sufficient in law to be answered unto by said respondent, and that the said additional answer of the United States is uncertain, untrue, and insufficient in law to be replied unto by these repliants.

Without this, that any other matter or thing in said answer contained material or effectual in law to be replied unto and not herein sufficiently confessed, traversed, avoided, or denied, is true.

All of which things these repliants have already proved and humbly pray as in and by their amended bill they have already prayed.

W. A. BLOUNT,
W. W. DEWHURST,
Solicitors for Petitioners.

(The foregoing has the following indorsement:) "# 210. Pg. 225. L. 1. District Court of United States, Southern District of Florida. Dalcour et al. vs. United States. Replication to amended answer filed nunc pro tunc. Filed Mar. 28th, 1905, as of July 6th, 1904. E. O. Locke, clerk."

* * * * * * *

238 *Final decree.*

In the District Court of the United States in and for the Southern District of Florida.

THEODORE DALCOUR AND OTHERS, HEIRS OF John Forbes; Fanny W. J. Innerarity and others, descendants and heirs of James Innerarity; Victoire Innerarity and others, descendants and heirs of John Innerarity,
vs.
THE UNITED STATES.

This cause coming to be heard at this term upon the report of the master appointed on the 5th day of December, A. D. 1904, in the decree confirming the validity of the grant hereinafter described, to ascertain and report to the court, according to the United States surveys thereof, the lands within the boundaries of the grant made by the Government of Spain to John Forbes and Company and confirmed in said decree of this court dated the 5th day of December, A. D. 1904, which are yet undisposed of by the United States, which report was filed on the 17th day of March, A. D. 1905, and exceptions thereto having been waived by counsel for petitioners and the exceptions taken thereto by the district attorney of the United States on behalf of the respondent having been considered and been overruled, has been considered by the court.

Whereupon, the law and evidence being duly considered, the court doth approve the report of the special master aforesaid, and finds that the same should in all respects be confirmed, and doth find from the evidence that the lands set forth and described according to the United States surveys thereof, in the report of the said special master and hereinafter fully set forth and described, are within the boundaries of the grant made by the Government of Spain to John Forbes and Company on the 20th day of February, A. D. 1818, and are the lands yet undisposed of by the United States of the lands granted to John Forbes and Company by the captain-general of Cuba and confirmed to the legal representatives of John Forbes, James Innerarity, and John Innerarity by decree of this court dated December 5th, A. D. 1904, and further finds that the
239 area of the lands granted as aforesaid to John Forbes and Company which have been disposed of by the United States is one million one hundred and ninety thousand four hundred and ninety-five (1,190,495) and 45/100 acres; and the court doth further find that included in said disposed-of lands there is a certain undefined portion of said lands embraced within said grant to John Forbes and Company covered by homestead entries thereon, made under the land laws of the United States, which homestead entries have not been proved up; and certain of said lands have been selected as swamp lands and the selection not approved; and a certain small area of said lands is yet unsurveyed.

It is therefore ordered, adjudged, and decreed by the court that the said report of R. B. Archibald, esq., as special master herein, be and the same is hereby confirmed; that as decreed on the 5th day of December, A. D. 1904, the grant made by Cienfuegos, the captain-general of Cuba to John Forbes and Company, for the tract of land in West Florida, commencing on the Apalachicola River at a point opposite the mouth of Sweet Water Creek, running due west to the river Choctawhatchee, thence following the course of said river to its mouth, on the Bay of St. Rosa, thence eastwardly winding along the shores of said bay and the sea, to the lands granted to the firm of John Forbes and Company by the Indians, running thence along the western boundary of said lands, up the Apalachicola River to the point of beginning is a valid, just, and binding title against the United States; that according to the United States surveys extended over said granted lands there is embraced therein according to said United States surveys all the lands (except a small area of townships eight and nine in what is known as "The Forbes purchase") situated in the State of Florida between the Apalachicola and Choctawhatchee rivers lying south of the township line dividing township one north from township two north; said lands being described on the plats of the United States as all the lands west of the Apalachicola River and east of the Choctawhatchee River in—

Township one (1), north of ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, inclusive.

Township one (1), south of ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 west, inclusive; or, according to the Tallahassee base line, township one south of ranges eight to twenty-two, inclusive.

240 Township two (2), south of ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 west, inclusive; or, according to the Tallahassee base line, township two south of ranges eight to twenty inclusive.

Township three (3), south of ranges 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 west, inclusive or, according to the Tallahassee base line; ranges eight to seventeen inclusive.
Township four (4), south of ranges 9, 10, 11, 12, 13, 14, 15, 16 west, inclusive.
Township five (5), south of ranges 8, 9, 10, 11, 12, 13, 14 west, inclusive.
Township six (6), south of ranges 8, 9, 10, 11, 12, 13 west, inclusive.
Township seven (7), south of ranges 8, 9, 10, 11, 12 west, inclusive.
Township eight (8), south of ranges 8, 9, 10, 11, 12 west, inclusive (except lands in "Forbes purchase").
Township nine (9), south of ranges 9, 10, 11, 12 west, inclusive (except lands in the "Forbes purchase").
that the following-described lands *lands* by the legal subdivisions thereof according to the United States surveys, being the lands within the boundaries of said grant to John Forbes and Company undisposed of under the land laws of the United States, and containing an area of seventy-nine thousand six hundred and eighty-one, and 49/100 acres, are the property of the legal representatives of John Forbes, James Innerarity, and John Innerarity, the grantees in said grant, who are parties to this suit and entitled to recover said lands as against the United States, to wit:

241 Township 1 north, range 8 west:

Blank	00	Nothing

Township 1 north, range 9 west:

NE. ¼ of SE. ¼	sec. 6	40.08
NE. ¼ of SW. ¼	10	40.00
SE. ¼ of SW. ¼	18	40.21
NE. ¼ of SW. ¼	19	40.02
NE. ¼ of NE. ¼	20	40.15
NW. ¼ of SW. ¼	29	40.07
NE. ¼ of NE. ¼ & NW. ¼ of SE. ¼	36	80.04

Township 1 north, range 10 west:

N. ½ of SE. ¼	6	80.12
NW. ¼ of NE. ¼	12	40.00
E. ½ of SW. ¼	17	80.02
SW. ¼ of NW. ¼ & NW. ¼ of SW. ¼	18	79.80
NW. ¼ of NE. ¼, SE. ¼ of NE. ¼, N. ½ of SE. ¼, & SW. ¼	19	319.37
SW. ¼ of NW ¼, W. ½ of SW. ¼, E. ½ of SE. ¼.	20	200.45
W. ½ of NE. ¼, E. ½ of NW. ¼, SE. ¼ of NE. ¼, NE. ¼ of NW. ¼, NW. ¼ of SE. ¼	21	280.56
S. ½ of NW. ¼, NW. ¼ of SE. ¼	28	120.36
S. ½ of NW. ¼, SE. ¼ of NE. ¼, SW. ¼, W. ½ of SE. ¼ & SE. ¼ of SE. ¼	29	400.84
W. ½ of NE. ¼, NW. ¼ & S. ½	30	559.93
NW. ¼ of NE. ¼, NW. ¼, W. ½ of SW. ¼, & E. ½ of SE. ¼	31	358.38
W. ½ of SW. ¼ & N. ½ of SE. ¼	32	159.66
NW. ¼ of NE. ¼, NE. ¼ of NW. ¼, & NW. ¼ of SE. ¼	33	119.55

Township 1 north, range 11 west:				
	NW. ¼ of NE. ¼, NE. ¼ of NW. ¼, NE. ¼ of SW. ¼, NW. ¼ of SE. ¼		2	160.04
	N. ½ of NW. ¼ & ½ of SE. ¼		4	160.14
242	S. ½ of NE. ¼, SE. ¼ of SW. ¼ & SE. ¼	sec.	8	279.79
	E. ½ of NE. ¼, SW. ¼ of NE. ¼, W. ½ of NW. ¼, SE. ¼ of NW. ¼, SW. ¼ of SW. ¼, E. ½ of SE. ¼		10	360.72
	N. ½ of NW. ¼, SW. ¼ of NW. ¼, & W. ½ of SW. ¼		12	200.12
	W. ½ of NE. ¼, W. ½, S. ½ of SE. ¼		14	478.50
	E. ½ ot NE. ¼ & SW. ¼ of NE. ¼		18	119.94
	NW. ¼		19	160.04
	SW. ¼ of NW. ¼, SW. ¼, & S. ½ of SE. ¼		20	279.58
	SW. ¼ of NE. ¼, NW. ¼ of NW. ¼, SW. ¼ of SW. ¼, S. ½ of SE. ¼, NE. ¼ of SE. ¼		21	240.57
	E. ½ of NE. ¼		22	80.37
	N. ½		23	320.31
	NW. ¼ & SE. ¼		24	320.80
	N. ½, W. ½ of SW. ¼ & SE. ¼		25	562.53
	E. ½		26	319.60
	W. ½ of SW. ¼ & SE. ¼ of SW. ¼		27	120.10
	N. ½, SW. ¼ of SW. ¼, E. ½ of SW. ¼ & SE. ¼		28	600.00
	N. ½ of NE. ¼, SE. ¼ of SW. ¼, & S. ½ of SE. ¼		29	199.87
	NE. ¼ of SW. ¼ & SE. ¼		32	199.85
	N. ½ & NW. ¼ of SE. ¼		33	361.58
	N. ½, E. ½ of SW. ¼ & SE. ¼		34	562.17
	N. ½, SW. ¼, & N. ½ of SE. ¼		35	562.94
	W. ½ of NE. ¼, S. ½ of NW. ¼, & W. ½ of SE. ¼		36	241.50
Township 1 north, range 12 west:				
	SE. ¼ of NE. ¼		8	40.08
	SE. ¼ of NW. ¼, NE. ¼ of SW. ¼		10	80.20
	All		18	639.67
	NE. ¼ of NE. ¼, SW. ¼ of NW. ¼, SE. ¼ of SE. ¼		20	120.06
	E. ½ of NE. ¼, SW. ¼ of NE. ¼, SW. ¼ of SW. ¼, & SE. ¼		24	319.84
	NW. ¼ of NW. ¼, NW. ¼ of SE. ¼		25	80.10
	NW. ¼ of NW. ¼		26	40.00
	NW. ¼ of NE. ¼		28	40.22
243	SE. ¼ of NW. ¼, SW. ¼ of SW. ¼	sec.	32	79.53
	NE. ¼ of SW. ¼		33	39.85
	N. ½ of NE. ¼		34	79.89
	NE. ¼ of NE. ¼ & NW. ¼ of NW. ¼		35	79.90
	SE. ¼ of NE. ¼ & SE. ¼ of SW. ¼		36	79.85
Township 1 north, range 13 west:				
	N. ½ of SW. ¼		2	480.30
	SE. ¼ of NE. ¼, S. ½ of SW. ¼, & SE. ¼		4	279.30
	E. ½ of NE. ¼ & SE. ¼ of SE. ¼		8	120.00
	N. ½ & SW. ¼		10	482.10
	All		12	638.72

Township 1 north, range 13 west—Continued.			
E. ½ of		14	320.20
SE. ¼ of NE. ¼, E. ½ of SE. ¼, W. ½ of NW. ¼, & W. ½ of SW. ¼		18	279.30
All		20	638.00
SE. ¼ of NE. ¼, E. ½ of SE. ¼, W. ½ of SW. ¼, & NE. ¼ of SW. ¼		22	241.04
NW. ¼		24	159.60
W. ½ of		26	320.20
E. ½ of NE. ¼, E. ½ of SW. ¼		28	159.60
NE. ¼ of		30	160.10
E. ½, N. ½ of NW. ¼, E. ½ of SW. ¼		32	481.48
NE. ¼ of NE. ¼, S. ½ of NE. ¼, E. ½ of SW. ¼, W. ½ of SE. ¼, SE. ¼ of SE. ¼		34	321.01
E. ½ of SE. ¼		36	80.19
Township 1 north, range 14 west:			
NE. ¼ of NE. ¼		2	39.97
SW. ¼		3	159.78
NW. ¼		4	159.68
N. ½ of NW. ¼, SW. ¼ of NW. ¼, NE. ¼ of SE. ¼		5	159.80
W. ½ of NE. ¼, SE. ¼ of NW. ¼, NW. ¼ of SW. ¼		6	159.70
SW. ¼ of NW. ¼, NW. ¼ of SW. ¼		12	80.00
NW. ¼		14	159.90
244 S. ½ of NW. ¼, W. ½ of SE. ¼	sec.	20	159.84
NW. ¼		22	159.98
N. ½ of 24		24	319.56
NW. ¼ of SW. ¼, NW. ¼ of SE. ¼, E. ½ of SE. ¼		24	159.78
SW. ¼ of NE. ¼, S. ½ of SW. ¼, SW. ¼ of SE. ¼		26	160.02
E. ½ of		28	319.87
S. ½ of NE. ¼, S. ½ of NW. ¼, & SW. ¼		32	199.61
N. ½, N. ½ of SW. ¼, & E. ½ of SE. ¼		34	579.94
NW. ¼		36	160.04
Township 1 north, range 15 west:			
SE. ¼		8	159.78
S. ½ of NW. ¼		10	79.10
SW. ¼ of NE. ¼, SE. ¼ of NW. ¼, E. ½ of SW. ¼, SE. ¼		14	320.84
NW. ¼ of NE. ¼, N. ½ of NW. ¼, SW. ¼ of NW. ¼, SW. ¼		18	320.84
SW. ¼ of NW. ¼, SW. ¼ of SW. ¼		20	79.93
NW. ¼, W. ½ of SW. ¼, E. ½ of SE. ¼		22	320.03
N. ½ of SW. ¼		24	80.05
E. ½ of NE. ¼, NW. ¼ of NE. ¼, SW. ¼ of NW. ¼, S. ½		26	481.32
N. ½		28	319.79
E. ½ of NE. ¼, E. ½ of NW. ¼, NE. ¼ of SW. ¼, & SE. ¼ of SE. ¼		30	239.79
SW. ¼ of NE. ¼, S. ½ of NW. ¼, SW. ¼ & SE. ¼ of SE. ¼		32	361.12
N. ½ of NE. ¼, N. ½ of NW. ¼, S. ½ of SW. ¼, & W. ½ of SE. ¼		34	319.52

Township north 1, range 16 west:			
SE. ¼ of SE. ¼		2	40.06
SE. ¼ of SE. ¼		12	40.07
NE. ¼ of SE. ¼		24	40.08
Lots 1, 7, 10, 11		30	223.04
NE. ¼ of NE. ¼		36	40.00
245 Township 1 south, range 8 west:			
Blank.			
Township 1 south, range 9 west:			
SE. ¼ of SW. ¼ & SW. ¼ of SE. ¼	sec.	31	80.58
E. ½ of SW. ¼		32	80.99
Township 1 south, range 10 west:			
NW. ¼ of SE. ¼		8	40.16
NE. ¼ of SW. ¼		21	40.02
Township 1 south, range 11 west:			
E. ½ of NE. ¼, NE. ¼ of SE. ¼, SW. ¼ of SE. ¼, & SW. ¼, NE. ¼ of NW. ¼		1	360.00
E. ½ and SW. ¼		2	479.70
NE. ¼ of NE. ¼		10	40.01
N. ½, N. ½ of SW. ¼, N. ½ of SE. ¼, SE. ¼ of SE. ¼		11	520.39
All of		12	639.60
NE. ¼, N. ½ of NW. ¼		13	239.79
E. ½ of NE. ¼		14	79.98
Township 1 south, range 12 west:			
NW. ¼, & SW. ¼ of SW. ¼		1	199.95
NW. ¼, W. ½ of NE. ¼		2	240.06
SW. ¼ of NW. ¼		3	40.01
E. ½ of SE. ¼		12	79.88
SW. ¼ of NW. ¼, W. ½ of SW. ¼		13	119.73
SE. ¼ of NE. ¼, & E. ½ of SE. ¼		17	120.06
W. ½ of ¼		29	80.00
246 Township 1 south, range 13 west:			
N. ½ of SW. ¼	sec.	1	79.88
SE. ¼ of NE. ¼ & SW. ¼ of SE. ¼		2	78.62
N. ½ of NW. ¼ & SW. ¼ of NW. ¼		3	119.98
W. ½ of NW. ¼		4	79.77
S. ½ of NE. ¼		5	79.98
NE. ¼ of NE. ¼		6	80.06
W. ½ of SW. ¼ & NE. ¼ of NE. ¼		8	120.28
N. ½ of SW. ¼		12	79.84
N. ½ of NW. ¼		13	79.98
SE. ¼ of NE. ¼, W. ½ of NW. ¼, NE. ¼ of NW. ¼		14	160.26
SW. ¼ of NE. ¼		15	40.06
Township 1 south, range 14 west:			
All		2	639.44
W. ½ of SE. ¼		4	79.72
NW. ¼ of NE. ¼, SE. ¼ of NW. ¼, NE. ¼ of SW. ¼, & SW. ¼ of SW. ¼		6	159.90

Township 1 south, range 14 west—Continued.			
N. ½ of NE. ¼, SW. ¼ of NE. ¼, NE. ¼ of NW. ¼, SW. ¼ of NW. ¼, SW. ¼ of SW. ¼, W. ½ of SE. ¼		8	320.04
E. ½ of NW. ¼, NW. ¼ of NW. ¼, E. ½ of SW. ¼, W. ½ of SE. ¼		9	280.00
S. ½ of NE. ¼, E. ½ of NW. ¼, NW. ¼ of NW. ¼, NE. ¼ of SW. ¼, & SE. ¼		10	400.65
N. ½		11	320.00
E. ½ of NW. ¼		17	80.14
NE. ¼		18	159.86
W. ½ of NW. ¼		19	79.95
NE. ¼ of NE. ¼, SW. ¼ of NE. ¼, SE. ¼ of NW. ¼		23	120.13
NW. ¼ of NE. ¼, SE. ¼ of SW. ¼		24	80.15
S. ½ of NE. ¼, SE. ¼ of NW. ¼		25	120.06
N. ½ of NE. ¼		27	80.14
E. ½ of SE. ¼		30	79.94
W. ½ of NW. ¼		31	79.46
247 Township 1 south, range 15 west:			
E. ½ of NE. ¼ & W. ½ of SW. ¼	Sec.	2	160.08
E. ½ of SE. ¼		10	160.04
S. ½ of NE. ¼ & N. ½ of SE. ¼		11	160.18
S. ½ of SE. ¼		12	79.93
E. ½ of NW. ¼, E. ½ of SW. ¼, & E. ½		13	479.82
NE. ¼ of NE. ¼, SW. ¼ of NE. ¼, NW. ¼ of NW. ¼, W. ½ of SW. ¼, SE. ¼ of SW. ¼		14	239.94
W. ½ of NW. ¼, S. ½ of SE. ¼		23	160.02
W. ½ of SW. ¼		25	80.13
W. ½ of SW. ¼		27	80.28
E. ½ of NE. ¼		28	80.11
Township 1 south, range 16 west:			
NE. ¼ of NE. ¼		1	40.02
SW. ¼ of NE. ¼ & E. ½ of SE. ¼		8	119.96
SE. ¼ of NW. ¼, N. ½ of SW. ¼, N. ½ of SE. ¼		9	200.30
E. ½ of SE. ¼		12	80.05
N. ½ of NW. ¼		15	80.12
W. ½ of NW. ¼		19	79.96
NE. ¼ of NW. ¼ & SE. ¼ of SW. ¼		21	80.04
E. ½ of NE. ¼		30	79.99
SE. ¼ of SE. ¼		32	40.02
NW. ¼ of NW. ¼ & SE. ¼ of SE. ¼		33	80.09
SW. ¼ of SW. ¼		34	40.04
E. ½ of SE. ¼		36	80.00
Township 1 south, range 17 west:			
W. ½ of NW. ¼		26	78.49
Lots 2 & 3, E. ½ of NW. ¼, & S. ½		27	493.13
N. ½, N. ½ of SW. ¼, N. ½ of SE. ¼, SE. ¼ of SE. ¼		28	521.75
NE. ¼ of NE. ¼ & N. ½ of SE. ¼		33	119.50
N. ½ of NE. ¼ & N. ½ of NW. ¼		34	159.90

248	Township 2 south, range 8 west:		
	N. ½ of NW. ¼, SE. ¼ of NW. ¼, NE. ¼ of SW. ¼	Sec. 5	158.93
	Lot # 5	19	36.75
	Lot # 6	19	35.69
	Township 2 south, range 9 west:		
	Blank.		
	Township 2 south, range 10 west:		
	SE. ¼ of SE. ¼	11	39.99
	Township 2 south, range 11 west:		
	NW. ¼	10	160.36
	Township 2 south, range 12 west:		
	NW. ¼ of SW. ¼	27	40.00
	Township 2 south, range 13 west:		
	NW. ¼ of NW. ¼	13	40.00
	NE. ¼ of NE. ¼	14	39.82
	SE. ¼ of SW. ¼	26	40.08
	Lot # 1	30	80.00
	E. ½ of NW. ¼	34	79.87
	Township 2 south, range 14 west:		
	NE. ¼ of NE. ¼ & W. ½ of SW. ¼	1	120.11
	S. ½ of SE. ¼	4	80.04
	W. ½ of SW. ¼	7	79.94
	N. ½ of NE. ¼, SE. ¼ of NE. ¼, NE. ¼ of SE. ¼	12	160.10
	NW. ¼	17	160.04
	E. ½ of NE. ¼	19	79.98
	S. ½ of SW. ¼	20	80.05
249	Township 2 south, range 15 west:		
	SE. ¼ of NW. ¼	Sec. 1	40.08
	SE. ¼ of SE. ¼	2	40.50
	W. ½ of NW. ¼, W. ½ of SW. ¼	3	159.92
	NE. ¼, W. ½ of SW. ¼	6	240.03
	SW. ¼ of NE. ¼, E. ½ of NW. ¼, NE. ¼ of SW. ¼	7	160.32
	W. ½ of NE. ¼	9	80.03
	SW. ¼ of NE. ¼, SE. ¼ of NW. ¼, W. ½ of SE. ¼	12	160.32
	NW. ¼ of NW. ¼	15	40.07
	SE. ¼ of NE. ¼	18	40.11
	E. ½ of NE. ¼ Y SW. ¼ of SE. ¼	25	119.88
	W. ½ of SW. ¼, E. ½ of SE. ¼	26	160.32
	Lots 12, 13, 14, 15	27	151.86
	All of	28	361.37
	Township 2 south, range 16 west:		
	N. ½ of SW. ¼	2	80.00
	NW. ¼ of NW. ¼ & E. ½ of SW. ¼	3	120.05
	SE. ¼ of SW. ¼ & SE. ¼ of SE. ¼	4	79.98
	N. ½ of NW. ¼, SW. ¼ of NW. ¼, W. ½ of SW. ¼	6	200.05
	SE. ¼ of SW. ¼	7	40.02
	NW. ¼ of NE. ¼ & NW. ¼ of NW. ¼	9	79.92
	SE. ¼ of NE. ¼	10	40.02
	S. ½ of NE. ¼	11	80.16
	W. ½ of SW. ¼	12	80.13

Township 2 south, range 16 west—Continued.			
N. ½ of NW. ¼		13	80.13
NE. ¼ of NE. ¼, E. ½ of NW. ¼, & SW. ¼ of SE ¼		14	160.44
Lot 2		18	40.04
N. ½ of SW. ¼		22	80.13
E. ½ of NE. ¼		32	80.15
W. ½ of NW. ¼ & W. ½ of SW. ¼		33	160.00
250 Township 2 south, range 17 west:			
SW. ¼ of NW. ¼ & NW. ¼ of SW. ¼	Sec.	4	79.91
SE. ¼ of NE. ¼		13	40.00
W. ½ of NE. ¼ & NW. ¼		30	238.95
Lots 1 & 2		33	126.08
Township 2 south, range 18 west:			
Blank.			
Township 2 south, range 19 west:			
Lots 2 & 3		21	94.50
Fractional		22	6.60
N. ½		29	319.92
NE. ¼ of		30	159.76
NE. ¼, SW. ¼, & W. ½ of SE. ¼		33	400.65
NE. ¼ of SE. ¼		36	35.63
Township 2 south, range 20 west:			
All		11	9.54
Lot 1		8	49.73
Lots 1 & 2		9	132.27
Lots 1 & 2		10	156.62
All		20	337.50
Lot 3		21	54.40
W. ½ of NW. ¼		28	80.00
E. ½ of NE. ¼		29	80.00
S. ½ of NE. ¼, S. ½ of NW. ¼, & S. ½		31	309.10
S. ½ of NW. ¼ & S. ½		32	400.70
W. ½ of SW. ¼		33	80.20
251 Township 2 south, 21 west:			
Lots 2 & 3	sec.	19	171.35
Lots 1, 3 & 4 & SW. ¼		27	375.73
All		28	465.20
All		29	575.70
All		30	635.83
All		31	1.82
All		32	74.76
All		33	181.60
All		34	323.20
S. ½ of NE. ¼, S. ½ of NW. ¼, & lots 1, 2, 3		35	347.80
S. ½ of NE. ¼, S. ½ of NW. ¼ & S. ½		36	388.73
Township 2 south, range 22 west:			
Blank.			
Township 2 south, range 23 west:			
All		4	484.50
N. ½ of NW. ¼ & E. ½		5	400.77

Township 3 south, range 8 west:			
Blank.			
Township 3 south, range 9 west:			
E. ½ of NE. ¼		15	79.65
Township 3 south, range 10 west:			
E. ½ of NW. ¼, S. ½ of SE. ¼		2	160.06
NW. ¼ of SW. ¼		22	39.98
Lot 3		24	79.98
Lot 4		24	20.62
W. ½		27	320.40
Lot 7		36	64.04
Township 3 south, range 11 west:			
Blank.			
252 Township 3 south, range 12 west:			
Blank.			
Township 3 south, range 13 west:			
SW. ¼ of NW. ¼	sec.	7	40.02
SW. ¼ of SW. ¼		12	40.02
NW. ¼ of NW. ¼		18	40.09
Township 3 south, range 14 west:			
Lot 1		7	134.26
E. ½ of NE. ¼		13	80.01
W. ½ of NW. ¼		33	80.18
Township 3 south, range 15 west:			
All fractional	sec.	6	6.88
All fractional		8	18.65
All fractional		17	19.72
W. ½ of NE. ¼, W. ½ & SE. ¼		31	559.27
W. ½ of SW. ¼		32	80.00
Township 3 south, range 16 west:			
W. ½ of NE. ¼, NW. ¼ & S. ½		18	528.63
Lots 1 & 3		20	114.50
SW. ¼		21	156.89
NE. ¼		22	160.19
N. ½ of SE. ¼ & W. ½		23	400.18
S. ½ of SW. ¼, SW. ¼ of SE. ¼		24	119.91
E. ½ of NW. ¼, NW. ¼ of NW. ¼, & SW. ¼		25	279.47
S. ½ of NE. ¼, N. ½ of NW. ¼, SW. ¼ of NE. ¼, & S. ½		26	518.16
S. ½ of NE. ¼, NW. ¼, lots 1, 2, 3		27	447.14
All		28	140.52
All		34	14.98
All		35	318.40
NW. ¼, W. ½ of SE. ¼, SE. ¼ of SE. ¼, lots 1 & 2		36	422.54
253 Township 3 south, range 17 west:			
E. ½ of NE. ¼ & E. ½ of SE. ¼	sec.	1	160.30
E. ½ of SW. ¼		3	80.13
W. ½ of NW. ¼, SW. ¼, W. ½ of SE. ¼, SE. ¼ of SE. ¼		4	341.82
All		5	384.00

Township 3 south, range 17 west—Continued.			
All		6	88.00
All		9	62.40
All		10	149.40
Lots 1 and 2		11	142.80
S. ½		12	320.48
All		13	364.65
All		14	2.00
Township 3 south, range 18 west:			
SW. ¼		1	164.78
SE. ¼		2	159.89
N. ½ of NE. ¼		11	79.98
N. ½ of NW. ¼		12	79.96
SW. ¼, W. ½ of SE. ¼		19	201.87
SE. ¼, E. ½ of SW. ¼		20	240.00
SW. ¼		21	160.16
S. ½		25	305.09
S. ½		26	320.36
All		27	538.34
All		28	316.04
All		29	84.11
All		34	3.14
All		35	174.16
All		36	164.34
254 Township 3 south, range 19 west:			
E. ½ of NE. ¼	sec.	1	79.87
W. ½ of SW. ¼		3	79.87
All		7	505.63
NE. ¼ of NE. ¼, W. ½ of NE. ¼, W. ½ of SE. ¼, & W. ½		8	518.20
SE. ¼ of NW. ¼, N. ½ of NW. ¼, SW. ¼ of SE. ¼, & E. ½ of SE. ¼		9	239.81
W. ½ of NE. ¼, NW. ¼, & SW. ¼ of SE. ¼		10	280.29
N. ½ of SE. ¼		11	79.97
SW. ¼ of SW. ¼, E. ½ of SW. ¼, & SE. ¼		13	279.47
E. ½ of SW. ¼, W. ½ of SE. ¼, SE. ¼ of SE. ¼		14	200.00
SE. ¼ of NE. ¼, W. ½ of NE. ¼, SW. ¼, W. ½ of SE. ¼		15	307.89
Lot 2		17	52.60
Lots 1 and 2		23	141.80
All		24	477.58
Township 3 south, range 20 west:			
S. ½		1	319.60
S. ½ of NE. ¼ & W. ½ of SE. ¼		2	558.95
All		3	546.68
Lots 1, 2, & 4		4	265.00
All		5	157.50
All		6	15.82
All		11	107.00
All		12	304.00

Township 4 south, range 9 west:			
Blank.			
Township 4 south, range 10 west:			
SE. ¼ of NE. ¼ & SW. ¼ of NE. ¼		2	80.10
NE. ¼ of SE. ¼		4	39.99
NE. ¼ of NW. ¼		9	39.99
NW. ¼ of NW. ¼		10	39.96
255 Township 4 south, range 11 west:			
SE. ¼ of SW. ¼ & SW. ¼ of SE. ¼	Sec.	35	80.14
Township 4 south, range 12 west:			
E. ½ of SE. ¼		34	80.11
Township 4 south, range 13 west:			
SW. ¼ of SE. ¼		14	40.01
S. ½ of SW. ¼, NE. ¼ of SW. ¼ & SE. ¼		26	280.14
Lots 2 & 3		35	155.00
Lots 1 & 4		36	216.07
Township 4 south, range 14 west:			
Lot 4		19	17.30
Lot 14		28	40.20
Lot 4		29	40.10
Lot 2		33	40.00
Lots 1, 5, & 6		35	124.27
Township 4 south, range 15 west:			
NE. ¼, NE. ¼ of NW. ¼. Lots 1, 2, 3, 4, 5, 6, & 10		6	404.42
All		8	299.15
Township 4 south, range 16 west:			
All fractional		1	107.00
Township 5 south, range 8 west:			
Blank.			
Township 5 south, range 9 west:			
Blank.			
Township 5 south, range 10 west:			
NW. ¼ of SE. ¼		13	39.61
256 Township 5 south, range 11 west:			
NE. ¼ of SW. ¼	Sec.	12	39.98
S. ½ of NW. ¼		1	80.00
W. ½ of NW. ¼		6	79.99
SE. ¼ of SE. ¼		14	40.02
E. ½ of NE. ¼ & SW. ¼ of NE. ¼		23	120.16
S. ½ of SE. ¼		29	80.04
NW. ¼ of NE. ¼		31	39.98
Township 5 south, range 12 west:			
SW. ¼ of SW. ¼		6	40.00
Lots 4, 5, 6, & 7		7	394.78
NW. ¼ of SE. ¼		9	39.88
SE. ¼ of SE. ¼		11	39.98
S. ½ of Lot 3		18	40.00
Lot 1		19	6.75
Lots 4, 5, & 6		23	133.23
Lots 12 & 15		25	80.00

Township 5 south, range I2 west—Continued.			
Lots 8, 9, 10, 11, 12, 13, 14, 15		26	320.00
Lot 1		27	25.49
Lot 4		28	40.00
W. ½ of NW. ¼, W. ½ of SW. ¼		30	160.06
W. ½ of SE. ¼		32	80.00
N. ½ of NW. ¼		35	79.96
NW. ¼ of NW. ¼		36	40.00
Township 5 south, range 13 west:			
Lots 3, 4, 5, & 6		5	160.00
NW. ¼ & SE. ¼		6	320.16
Lots 1, 2, 3, 6, 7, 8, 9, 10, 11, 13, 14, 15, & 16.		7	515.80
NW. ¼, S. ½ of NE. ¼ & S. ½		8	561.33
N. ½ of NW. ¼		9	80.00
Lots 1, 2, & 3		10	120.22
Lots 7 & 8		14	80.00
Lots 1, 9, 10, 11, 12, 13, 14, & 15		15	319.28
257 (continued)			
Lots 1, 2, 3, 7, & 8	Sec.	17	200.25
Lots 2 & 3		18	78.36
All		22	641.20
W. ½ of NW. ¼		25	80.17
All		26	642.08
All		27	533.00
Lots 1, 2, 3, 4, 5, 8, 11, 12, 13		35	353.45
W. ½ of SW. ¼		36	80.13
Township 5 south, range 14 west:			
Blank.			
Township 6 south, range 8 west:			
Township south, range 9 west:			
S. ½ of lot 2 & N. ½ of NW. ¼		3	121.96
SE. ¼ of NW. ¼		30	40.03
Township 6 south, range 10 west:			
Blank.			
Township 6 south, range 11 west:			
S. ½ of NE. ¼		4	80.57
SW. ¼ of NW. ¼		5	40.24
E. ½ of NE. ¼, Y. S. ½		6	402.90
W. ½ of NE. ¼ & NW. ¼		7	242.79
W. ½ of SE. ¼ & SW. ¼		14	239.97
S. ½ of SW. ¼		20	80.16
SW. ¼ of SW. ¼		21	40.17
NE. ¼ of NW. ¼		29	40.15
SW. ¼		32	160.92
Township 6 south, range 12 west:			
SE. ¼ of SW. ¼		2	40.00
W. ½ of NE. ¼, E. ½ of NW. ¼, NW. ¼ of NW. ¼, & W. ½ of SW. ¼		5	361.41
(continued)			
258 (continued)			
E. ½ of SE. ¼, SW. ¼ of NW. ¼	Sec.	6	120.33

Sownship 6 south, range 12 west—Continued.			
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, & 10		7	384.83
W. ½ of NW. ¼, SW. ¼ of SE. ¼		8	120.19
All		10	640.72
Lots 2, 3, 4, 5, 6, 7, 8, 9, & 10		17	358.69
All fractional		22	43.00
Lot 3		23	40.00
N. ½, NW. ¼ of SW. ¼, E. ½ of SE. ¼, & NW. ¼ of SE. ¼		24	479.93
Lots 2 & 3		25	80.00
Township 6 south, range 13 west:			
Blank.			
Township 7 south, range 8 west:			
Blank.			
Township 7 south, range 9 west:			
SW. ¼	Sec.	3	160.51
Township 7 south, range 10 west:			
Blank.			
Township 7 south, range 11 west:			
SW. ¼ of NW. ¼, W. ½ of SW. ¼	Sec.	1	120.11
N. ½ of SE. ¼		2	479.82
SW. ¼ of SW. ¼		4	40.13
Lots 2, 3, 6, 7, & 8		5	200.00
Lots 3, 6, 7, 9, 10, & 14		9	240.00
SW. ¼ of SW. ¼		10	40.15
SW. ¼ of NW. ¼		12	40.09
SW. ¼ of NE. ¼, NE. ¼ of NW. ¼, NE. ¼ of SE. ¼		15	120.48
NE. ¼ of NE. ¼ & SW. ¼ of NE. ¼		23	80.26
SW. ¼ of SW. ¼		24	40.04
Township 7 south, range 12 west:			
Blank.			
259 Township 8 south, range 8 west:			
Blank.			
Township 8 south, range 9 west:			
Blank.			
Township 8 south, range 10 west:			
SW. ¼	sec.	17	160.84
E. ½ of SE. ¼		17	80.42
SW. ¼ of SW. ¼		19	40.02
W. ½ of SW. ¼		30	80.10
NE. ¼ of 31		31	160.24
SE. ¼		31	160.24
SW. ¼		32	160.50
SW. ¼		31	160.24
Township 8 south, range 11 west:			
SW. ¼ of NW. ¼, W. ½ of SW. ¼		36	120.32
Township 8 south, range 12 west:			
Blank.			
Township 9 south, range 9 west:			
Blank.			

Township 9 south, range 10 west:		
Blank.		
Township 9 south, range 11 west:		
Lots 9 & 16.....	1	80.00
Lots 6, 11, & 14.....	12	120.36
E. ½.....	13	321.12
Lots 2 & 3.....	14	99.83
Township 9 south, range 12 west:		
Blank.		

260 That the survivors of the petitioner in this suit, namely, Stephen Tennant, Henrietta Tennant, Blanche Bruce, Jules Fontena, Leocadie Morrison, Helen Durcos, Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, Fanny Wycoff, James I. Innerarity, Eloise Wilson, her husband John Wilson, Albert H. W. Innerarity, Eliza Boggs, Eliza Minor, Harriet Deschapelles, her husband E. Le. Breton Deschapelles, Eliza M. Barton, Eliza Melanie Innerarity, John Hulse, Victoire Hulse, and Emma Taylor, or such of them as were living at the date of the decree rendered herein on the 5th day of December, A. D. 1904, and the survivors of them and their assigns are entitled to receive from the United States a patent or patents for the lands last above described, and are entitled to enter any of the public lands of the United States to the amount and extent of one million one hundred and ninety thousand four hundred and ninety-five (1,190,495) and 45/100 acres of said entry to be made in conformity to the requirements of the 6th section of the act of Congress, approved June 22nd, 1860.

That the said Stephen Tennant, Henrietta Tennant, Blanch Bruce, Jules Fontena, Leocadie Morrison, Helen Drucos, Louis M. Innerarity, Emanuel Innerarity, Margaret Hiern, Fanny Wycoff, James I. Innerarity, Eloise Wilson, her husband John Wilson, Albert H. W. Innerarity, Eliza Z. Boggs, Eliza Minor, Harriett Deschapelles, her husband E. Le Breton Deschapelles, Eliza M. Barton, Eliza Melanie Innerarity, John Hulse, Victoire Hulse, and Emma Taylor, or such of them as were living on the 5th day of December, A. D. 1904, and the survivors of them shall hold said lands patented herein, and said rights to enter the public lands of the United States, for the use and benefit of the legal representatives of John Forbes, James Innerarity, and John Innerarity, partners in the firm of John Forbes and Company, and the grantees in said grant, who are parties to this suit and are entitled therein to recover said lands and said rights of entry as against the United States.

That as to the unsurveyed lands within the said grant to John Forbes and Company, the lands within said grant which have been entered under the homestead laws of the United States, which shall not be proved up and perfected into title in the several entrymen under and according to the requirements of the said homestead laws; the lands in said
261 grant selected as swamp lands, the selection of which have not been approved and the patents have not been issued therefor by the United States, and as to the respective undivided interests of the original petitioners and the heirs and legal representatives of such of the original petitioners as have died or may die before the termination of this suit, and of all persons claiming any rights to said lands or said rights of

entry under them or any of them, and as to all matters of costs, counsel fees, and other matters of like nature this court reserves to itself such further direction to carry this decree into effect according to the principles of the act of Congress of June 22nd, 1860, and as may be necessary and as may be equitable and just.

Done and ordered in open court this eighth day of April, A. D. 1905.

JAMES W. LOCKE, *Judge.*

(The foregoing is endorsed as follows:) "No. 210. Pg. 225. L. I. United States Dist. Court Southern Dist. of Florida. Theodore Dalcour et al. vs. United States. Final decree. Filed April 8th, 1905, and entered pg. 21, Jgmt. Record. E. O. Locke, clerk."

262 *Assignment of errors.*

In the District Court of the United States, Southern District of Florida.

THEODORE DALCOUR AND OTHERS, HEIRS OF John Forbes, deceased; Fanny W. J. Innerarity and others, descendants and heirs of James Innerarity; and Victoria Innerarity and others, descendants and heirs of John Innerarity,

vs.

THE UNITED STATES.

Assignment of errors.

Now comes the defendant and appellant, by Joseph N. Stripling, U. S. attorney, and says the decree herein is erroneous and assigns the following reasons therefor:

I. The court erred in making the decree of May 8th, 1901, restoring to the files of the District Court papers claimed to be copies of the original files in this cause.

II. The court erred in overruling the demurrer to the bill of revivor filed herein.

III. The court erred in granting the motion of the claimants to strike from the files the pleas of the defendant to the bill of revivor.

IV. The court erred in denying defendant's motion to strike the amended petition from the files.

V. The court erred in granting the motion made by the claimants, at the hearing of the cause, to amend the petition by adding immediately before the prayer for relief therein the words following, viz, "That the grant (hereinbefore correctly described, except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the captain-general of Cuba on February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818."

263 VI. The court erred in ordering, adjudging, and decreeing that the grant by Cienfuegos, the captain-general of Cuba, to John Forbes and Co., made on the 20th day of February, A. D. 1818,

which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for the lands described, was a valid, just, and binding title against the United States.

VII. The court erred in decreeing that the petitioners herein were entitled to receive from the United States a patent for all the described tract of land not sold or otherwise disposed of by the United States, and entitled to enter any of the public lands of the United States, liable to private entry at one dollar and a quarter per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the described tract, according to the 6th section of the act of Congress approved June 22nd, 1860.

VIII. The court erred in deciding that a claim for lands in West Florida, by virtue of a grant made by the captain-general of Cuba on the 20th day of February, 1818, could be confirmed under the provisions of the act of Congress approved June 22nd, 1860.

IX. The court erred in deciding that a grant of lands in West Florida, made by the captain-general of Cuba, since the 24th day of January, 1818, was not null and void by virtue of the 8th article of the treaty between the United States and the King of Spain of the 22nd day of February, 1819.

X. The court erred in overruling the exception to the report of the master that there had been 1,190,495.45 acres of land within the boundaries of the grant as described in the petition herein disposed of by the United States.

J. N. STRIPLING,
U. S. Atty.

(The foregoing is endorsed as follows:) "U. S. District Court, So. District of Florida. Dalcour et al. vs. The United States. Assignment of errors. Filed April 8th, 1905. E. O. Locke, clerk."

264 *Prayer for appeal and allowance.*

In the District Court of the United States, Southern District of Florida.

THEODORE DALCOUR AND OTHERS, HEIRS OF John Forbes, deceased; Fanny W. Innerarity and others, descendants and heirs of James Innerarity; and Victoria Innerarity and others, descendants and heirs of John Innerarity,
vs.
THE UNITED STATES.

The defendant, the United States, conceives itself aggrieved by the decree made and entered herein, and hereby appeals from said order and decree to the Supreme Court of the United States and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said Supreme Court of the United States.

And defendant states that the reasons for said appeal are specified in the assignment of errors filed herewith.

Jacksonville, Fla., April 8th, 1905.

J. N. STRIPLING,
U. S. District Attorney.

It is ordered that the appeal be and the same is hereby allowed as prayed. Done and ordered in open court this Jacksonville, Fla., April 8th, 1905.

JAMES W. LOCKE, *Judge.*

(The foregoing is endorsed as follows:) "U. S. District Court, So. District of Florida. Theodore Dalcour et al. vs. United States. Prayer for appeal and allowance. Filed April 8th, 1905. E. O. Locke, clerk. Ent. minutes, p. 297."

* * * * * * *

287 A.

La Casa de Forbes y Compañía, 1829.

Filed in evidence and marked "Exhibit 3–A."
Dec. 30, 1903.

R. B. ARCHIBALD,
Spl. Master.

288 A.

Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

EXMO. SOR.: Don Juan Forbes, socio y director de la casa de Forbes y Compañia, establecida en la plaza de Pensacola en virtud del R^l^ privilegio, p^a^ hacer su giro mercantil y especialm^te^ con los Indios de aquella provincia ante V. E. del modo mas conforme parezco y digo; que durante los movimientos y acciones de la última guerra tenida entre los Indios americanos y los súbditos ingleses de la Gran Bretañia, han padecido nuestros intereses, asi en fincas rurales, como en almacenes, efectos &^a^ mas ayá de lo que cabe en toda exageracion. Muchos de los
289 esclavos pertenecientes á la sociedad fueron sublevados y escondidos por los Indios mientras el Coronel Nicholes permaneció alli, y aunque el Gobierno de Pensacola, cerciorado del hecho, reclamó el violento despajo de los siervos, todo fué en vano porq^e^ no se llegaron á devolver.

Para facilitar su restitucion sin q^e^ el R^l^ erario sufriera una pérdida, á la cual estaba, y está responsable habilitó ni sociedad, barcos p^r^ diversas ocasiones costiados de su propio peculio con el único fin de reclamarlos.

En el primero q^e^ salió con el mencionado objeto, mandó el Gobierno en comision al capn. del Regimiento de la Luisiana, D. Benigno Calderon, en union de ostros oficiales.

Posterior á esto pr. dos ocasiones, á personas particulares, para q^e^ los empleados públicos no se separasen de sus destinos; pero el resul-
290 tado de las tales misiones fueron siempre no conseguir la devolucion de las cosas despojadas. La misma casa diputó á Edunicino Doyle y á Guill^mo^ Hambley para el precitado fin dándole gratificaciones considerables por su trabajo, é indemnizando al último la pérdida que sufrió de quanto tenia.

A mas de esto, Woodbine instigó á los Indios, tambien de quien se hizo jefe á robar negros, y tuvimos que perseguirle formandole proceso criminal en provid^{a}, lo q^{e} motivó unos gastos extremados sin buen suceso, p^{r} q^{e} tuvo arte ó arvitrio de escaparse de manos de la justicia p^{r} manera q^{e} todos los esfuerzos y sacrificios hechos p^{r} la casa p^{a} salvar al gobn^{o} de
estas pérdidas, solo han servido para aumentarlas.
291 En aquel mismo tiempo de desórden y confucion, se llevaron los citados Indios como mil bestias de la propiedad de la comp^{a}, perdiendo en otra parte treinta y ocho caballos y dos mulas; y por ultimatum una cuadrilla de ellos mismos incendieron los almacenes de la casa en Apalachicola cargando con once esclavos nuestros, con toda la bayada, caballerías y demas utensilios, y enseres q^{e} allí había, sin perdonar

292 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

y en calidad de prisioneros á Doyle y Hambley, quienes, con razon y justicia, reclaman á la casa los daños y perjuicios personales q^{e} han experimentado con tan extraños como inauditos procedimientos.

Tantas pérdidas, en q^{e} incluyendose el trabajo de los negros, capitales ó intereses del dinero, no baxan p^{r} un cálculo moderado de cien mil p^{s}, debe indemnizarlos este superior Gob^{o} á quien está sujeto el de Pensacola, ya sea con numerario, ó ya compensando á mi sociedad con otra cosa equivalente.

293 [SEAL.] [Flourishes.]

Los quebrantos son positivas, son constantes, y basta hecharse á la vista la correspondencia q^{e} ha llevado sobre el particular el comand^{te} de la provincia con esta capitanía gral.; p^{a} que no se dude, de mi veraz exposicion; sobre q^{e} tambien puede dar una plenisima comprobacion con el agrimensor Gra^{l} Cap^{n} Don Vicente Sebastian de Pintado, D. Fran^{co} de Arroyo Agregado á la secretaría de esta intend^{a} y con otros individuos de igual concepto qe han estado en Pensacola al servicio de S. M.

Así pues, considerando p^{r} una parte quan dificultoso será pagarme en dinero sonante y con-

294 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

tante, como es muy debido, las cien mil p^{s} á q^{e} incocusamente es acreedora mi casa p^{r} la notoria escases de numerario que padecen las cajas públicas; y por otra q^{e} los muchos servicios q^{e} ha hecho en todo tiempo al Soberano con cuyos medios y recursos se puede decir que se ha sostenido la tropa de aquella guarnicion; teniendo aun todavía pendiente y
p^{r} recibir mas de ocho mil p^{s} aumentaria considerablemente la
295 poblacion de la provincia sin compensacion de la citada suma se adjudica el pleno dominio á la precitada comp^{a} de Forbes p^{r} quien represento un paño ó giron de tierra q^{e} se halla vacante, principia

del arroyo conocido, por de agua dulce en el río de Apalachicola y sigue en derechura al oeste hasta el río Chata Hacha, tamando el curso de este río hasta su embacadura en la Bahia de la Isla de Rosas, y dirigiendose hacia el este p^r la rivera de la misma bahia, y de la mar hasta el límite de las tierras al oeste del río Apalachicola ya cedidos p^r los Indianos á nuestra casa siguiendo los límites de el oeste de estas tierras, y subiendo el curso del mismo río hasta el punto de salida.

296 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

Conozco muy bien que el citado terreno, q^e en muchísima parte no es cultivable, no compensa ni la cuarta parte de la cantidad que reclamo; p^r q^e el tamaño de las pérdidas y quebrantos experimentados monta como ya he dicho á mas de cien mil p^s, pero como ha de ser, esto será otro nuevo motivo q^e aumente el amor y constante lealtad q^e yo y mis socios profesamas á nuestro Soberano, no queriendo q^e S. M. sienta el detri-
297 mento de tan cuantioso desembolso; contentandonos con q^e solo el tiempo y nuestra industria pueda hacer producible en beneficio de la misma provincia y aumento de su real patrimonio. Por tanto—

A. V. E. sup^co q^e en merito de lo recomendado; del q^e ofrece la correspondencia entre la comandancia de Pensacola y este gobierno sobre los perjuicios narrados; y el de la informacion q^e incontinente ministrare para comprobarlos, se sirva adjudicar en dominio pleno á la sociedad de Forbes y Compañía de q^e soy jefe, y por quien represento el terreno ó paño de tierra q^e queda designado bajo los puntos y lindaros

298 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

explicadas librandose las providencias necesarias q^e radique la posecion con lo cual nos daremos por satisfechos, contentos y compensados de las reclamaciones de perjuicios y indemnizaciones demandadas que así es justicia q^e pido juramento de no ser de malicia y lo necesario, &^a.

Don PEDRO ANT^o DE AYALA.

JUAN FORBES.

299 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

HABANA *y enero 5 de 1818.*

Para proveer lo que corresponda llevase al asesor gener^l.
CIENFUEGO.

MIGL. MENDEZ.

En la Hab^a en dicho día lo hice saber á D^n Juan Forbes.

MENDEZ.

HABANA *y enero 5 de 1818.*

Vistos: Recibase la informacion que promueve la casa de Forbes y Compañía en su antecedente insta. por ante el presente Ex^mo^, á quien se comete impartiendose los auxilios q^e^ sean necesarios

300 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

en la forma política de estilo; y evacuada traiganse con los antecedentes que recitan. Asesoria, veinte y cuatro reales pagados.

DEL MONTE.

CIENFUEGO.

MIGL. MENDEZ.

En dh^o^ día, mes y año lo hice saber á D^n^ Juan Forbes, doy fé.

MENDEZ.

en. 7

HABA. *y feb^o^ 14 de 1818.*

Ases^a^, 10 r^s^ pag^s^. Cumplase sin perjuicio de esta jurisdiccion.

P. M. RAMIREZ. CAMPUSANO.

MIG^L^ MENDEZ.

301 En la ciudad de la Havana en { siete / catorce } de { enero / febrero } de mil ochocientos diez y ocho, en virtud de lo mandado, pasé á la casa de la habitacion de D^n^ Fran^co^ Gutierrez de Arroyo, secretario, que fué de la intendencia que hubo en la Florida Occidental y actualmente agregado á la de esta superinten^a^ general, subdelegada de quien recibí juramento que lo hizo en la forma dispuesta por dro. bajo del cual ofreció decir verdad y examinado al tenor del escrito de la foxa primera que produxo

Juan Forbes

D. (Colin Mitchell como apoderado de la casa de Forbes y Campañía del comercio de Panzacola) despues de bien enterado de su tenor,

302 dixo que con motivo de haber residido en aquella plaza desde febrero de mil ochocientos seis, desempeñando su empleo puede asegurar como testigo ocular que los hechos en que descansan los que le preguntan para demandar la indemnizacion de perjuicios, son tan ciertos y tan positivos, que no habrá persona imparcial de aquella provincia que dexe de confesarlos; que las pérdidas fueron enormes y así en la citada plaza como en la factoria que tenían establecida los que le preguntan en los ríos de Apalachicola y Perdido; que los Indios sublevaron los esclavos que tenían en las fincas escondiendolos mientras el Coronel Nicholes permaneció allí

303 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

sin que bastasen los reclamos del gobierno para que se devolvieran ni las comisiones que posterior á esto se dieron al capitan del regimiento de la

Luisiana, D. Benigno Calderon, en union de otros oficiales ni á diversas personas particulares; de manera que en concepto del reclamante no está exagerada la suma de cien mil pesos que se demandan por los perjuicios narrados comprendiendose como mil y pico de bestias bolladas,
304 cavallerías y demas utensilios y menesteres que le robaron á la casa de Forbes los indicados Indios de que no ha recibido la mas mínima compensacion de nuestro gobierno, siendo la única que en Panzacola ha hecho servicios importantes al Soberano. Y responde que lo que dexa declarado es la verdad en cargo de su juramento, que es de edad de cincuenta y cinco años, que no le tocan las generales de la ley de que fué instruido se le leyó y expuso estar conforme y firmó, de que doy fé.

FRAN^co^ GUTIERREZ DE ARROYO.

ANTONIO MIGL. MENDEZ.

305 En la ciudad de la Havana. En el mismo día, mes y año pasé á la casa de D. Vicente Sebastian Pintado, agrimensor general por S. M., de quien recibí juramento, que hizo segun dro., ofreció decir verdad y examinado, dixo que con motivo á su permanencia en Pensacola sabe y le consta que durante los movimientos y acciones entre los Indios americanos y los súbditos ingleses de la Gran Bretaña padició la casa de Forbes y Compañía, establecida allí con real permiso para la trata con las tribus indias perjuicios de la mayor entidad; en Panzacola, Perdido y Apalachicola por los eventos y causas que espresa y aunque el declarante no puede graduar á quanto

306 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

habían ascendido los años y perjuicios, considera que debe ser una suma considerable; que igualm^te^ han hecho importantes servicios en todos tiempos á la tropa de aquella guarnicion y al Rey, Nuestro Señor, sobre que el secret^o^ de este Gobierno debe haber constancia. Y responde que quanto dexa expuesto es la verdad en cargo del juramento prestado que es mayor de edad, que no le tocan las generales de que fué instruído, se le leyó y expresó estar conforme y firmó, de que doy fé.

VICENTE SEBAST^n^ PINTADO.

ANTONIO MIGL. MENDEZ.

307 En la ciudad de la Havana, en il mismo día, mes y año, pasé á la casa de la habitacion de D. Fran^co^ Guerrero, capitan del Regimiento de la Luisiana, de quien recibí juramento, que hizo en la forma dispuesta por derecho, baxo del cual ofreció decir verdad y examinado como el antecedente, dixo que con ocasion á su dilatada permanencia en Panzacola sabe y le consta que durante los movimientos y acciones entre los Indios americanos y los súbditos ingleses de la Gran Bretaña padeció la casa de Forbes y Compañía, establecida allí con real permiso para
308 la trata con las tribus indias perjuicios de la mayor entidad; que durante la permanencia del Coronel Nicholes, los mismos Indianos se sublevaron y escondieron porcion de negros, sus esclavos, aconteciendo lo propio cuando Nandbine se hizo jefe de ellos y los compelió á robar ne-

gros y hacer otros atentados de gravedad; que se llevaron el número de bestias, bolladas y caballos, que se designa arruinando las factorías que tenían establecidas en los ríos de Apalachicola y Perdido, que aunque se hicieron varias aclamacion por aquel Gobierno para la restitución de los cuantiosos bienes despojados á Forbes y Compañía nada se consiguió,

309 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1919.

estando la sociedad en el caso de reclamarlos al Soberano; que es inquestionable que podrán ascender á la suma de cien mil pesos que se demandan por ellos por un cálculo de aproximacion no menor que los importantes servicios que los que le preguntan tienen hechos en todos tiempos á la tropa de aquella guarnicion y al Rey, Nuestro Señor, sobre que en la secretaría de este Gobierno debe haber constancia. Y responde que
310 cuanto dexa expuesto es la verdad en cargo de su juramento que es mayor de edad, que no le tocan las generales de la ley de que fué instruído se le leyó expuso estar conforme y firmó, de que doy fé.

FRAN^co GUERRERO.
MIGL. MENDEZ.

311 En la ciudad de la Habana, en el citado día, mes y año, en virtud de lo mandado, pasé á la casa de la habitacion de D. Fran^co Morales, capitan del Regimiento de la Luisiana, de quien recibí juramento que lo hizo en la forma dispuesta por derecho, baxo del cual ofreció decir verdad y examinado en el órden que los antecedentes, dixo que con motivo de haber residido mucho tiempo en la Plaza de Panzacola y principalmente durante los movimientos y acciones entre los Indios americanos y los súbditos ingleses de la Gran Bretaña, sabe y le consta que la casa de Forbes y Compañía, establecida allí con real permiso para tratar con las
312 tribus indias, padeció los perjuicios que se relacionan en el escrito de la primera, pues es evidente que durante la permanencia del Coronel Nicholes los mismos Indios se sublevaron y escondieron porcion de negros, sus esclavos, aconteciendo lo propio cuando Nandine se hizo jefe de ellos, y los compelió á robar negros y hacer otras atentadas de gravedad; que se llevaron el número de bestias, bolladas y caballos, que se designan arruinando las factorías que tenían establecidas en los ríos de Apalachicola y Perdido, que aunque se hicieron
313 varias aclamaciones por aquel Gabierno para la restitucion de los cuantiosos bienes despojados á Forbes y Campañía nada se consiguió; estando la sociedad en el caso de reclamarlos al Soberano; que es inquestionable que podrán ascender á la suma de cien mil pesos que se demandan por ellos por un cálculo de aproximacion no menos que los importantes servicios que los que preguntan tienen hechos en todos tiempos á la tropa de aquella guarnicion y al Rey, Nuestro Señor, sobre que en la secretaría de este Gob^no debe haber constancia. Y responde que cuanto dexa expuesto es la verdad en cargo de su juramento que es mayor de edad, que no le tocan las

314 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

generales de la ley de que fué instruído se le leyó y expuso estar conforme y firmó, de que doy fé.

FRN^co DE P^la MORALES.
ANTONIO MIGL. MENDEZ.

HABANA y { en^o 10 / feb^o 20 } de 1818.

Vistos: Con los antecedentes que se mandaron pasar á la consulta en providencia del seis del corriennte; teniendo en consideracion su
315 mérito y el que produce este expediente en que la casa de Forbes y Compañía, establecida con real permiso en la Plaza de Panzacola para hacer el comercio con las tribus indias, reclama la indemnizacion de cien mil pesos que ha experimentado en pérdidas efectivas, daños y perjuicios durante los movimientos y acciones entre los mismos Indios americanos y los súbditos ingleses de la Gran Bretaña mientras permaneció allí el Coronel Nicholes y cuando Nandbine se hizo jefe de aquellos, instigandolos á cometer toda clase de robos sobre que en aquella época se hicieron los debidos reclamos sin conseguirse que se devolvieron á la citada casa de Forbes y Compañía los

316 Sello tercero.

[SEAL.] Dos reales. Años de 1818 y 1819.

negros y demas animales y bienes de que injustamente fué despojado; y por otro extremo que el paño de tierra q^e pide se le adjudique en pago ó compensacion de la expresada cantidad nunca puede ascender á esta suma en una provincia de cortisima poblacion en que los terrenos permanecen incultos sin haber quien se dedique á su cultivo segun los informes que se han tomado entre ellos el del agrimensor general de S. M., D.
317 Vicente Sebastian Pintado; y que entrando en su dominio D. Juan Forbes, jefe principal de aquella sociedad, podrá benificiarla y atraer colonos que se establezcan en ella justificando á favor del estado lo que hoy existe yermo y abandonado, cuyas consideraciones movieron el digno ánimo de S. M., para que en real cedula de diez de agosto de mil ochocientos quince ofreciere terreno á los que quisieran situarse en la Isla de Puerto Rico como el medio mas interesante q^e puede emplearse para el aumento de una poblacion desde luego. Dixo S. Exa. que en uso de las facultades que le competen aplicaba y aplicó el mencionado
318 terreno á D Juan Forbes y Compañía bajo de los puntos y límites que se designan en el escrito de la foxa primera quedando por lo mismo privado de todo derecho á reclamar del real erario las pérdidas y perjuicios que hubiere experimentado, pues con su valor, sea cual fuere queda compensado de todo y chanceladas sus demandas de indemnización que había establecido; tal comandante de la citada Plaza de Panzacola en virtud de esta resolucion lo ponga en quieta y pacífica posecion del mencionado ter-

rreno; á cuyo logro Su Exa. mandando que á la misma casa de
319 Forbes se le den los testimonios que necesite, arduvandose el original asesoria treinta y dos rr^{s}. pagados.

DEL MONTE.
M.

Pag^{s}.
Cienfuego. MIGL. MENDEZ.

En dho. día lo hize saber á D. Juan Forbes, doy fé.
MENDEZ.

320 Un quartillo.

[SEAL.] Sello quarto, un quartillo, años de mil ochocientos diez y ocho y diez y nueve.

Pase al Sr. Asesor General, Cienfuegos.

HAB^{a} y dis^{e} 18 de 1818.

EX^{mo} SOR: La casa de Forbes y Compañía, del comercio de Panzacola, por medio de su apoderado en esta ciudad á V. E. dice: Que en medio del trastorno y confucion que ha ocasionado en los archivos públicos en aquella plaza, la entrada y posecion que de ella tomaron las armas americanas ha conservado el auto ó despacho original que expidió el Sr. Coronel D. José Masot, comand^{te} político y militar en la
321 provincia de Florida á conseq^{a} del que le libró este Sup^{r} Gobierno sobre indemnizi^{e} ó perjuicios reclamados por los exponentes; y conveniéndoles que de él se le den dos testimonios para agregar uno al exped^{te} que existe en Penzacola y otro para conservarlo.

A V. E. suplica se sirva mandar que por el exm^{o} Gobierno se le provehan de las dos compulsas q^{e} solicita q^{e} es gracia q^{e} implora. Hab^{a} y dis^{e} 17 de 1818.

COLIN MITCHELL.

HABANA y dis^{e} 18 de 1818.

Vistos: P^{r} presentado el documento que se expresa provean á la casa de Forbes y Compañía del testimonio que solicita: asesoria diez y seis rr^{s} pagados.

DEL MONTE.
M.
CIENFUEGOS. MIGL. MENDEZ.

322 En dho. día, mes y año lo hice saver á D. Colin Mitchell, doy fé
MENDEZ.

D. José Marrot, coronel del real cuerpo de (ingenieros) artillería, comandante político y militar de la provincia de la Florida Occidental, subdelegado de la real hacienda en ella, etc.

Por quanto y en cumplimiento del superior decreto que antecede del Exmo. Señor Capitan Gral. de esta provincia de diez del presente mes y año por el que por vía de indemnizacion, concede á la casa de Forbes y Compañía un paño de tierra cituado entre el Rio de Apalachicola
323 al E. el Chatahache al O. el mar al S. y al N. por una línea que ha de empezar enfrente del arroyo conocido por el nombre de Aguadulce, ó Sweet Water Creek, situado en la parte oriental del Apalachicola como á tres millas y media al N. del paraxe conocido con el nombre de Allmus Bluff y ha de correr al O. hasta encontrar el Chatahache y desde allí seguir las sinuosidades de este río hasta su desague en

la Bahia de Santa Rosa, de allí siguiendo la rivera este de este hasta el mar formando su alta marca los límites del sur hasta encontrar con los de la tierra que ya tiene adquirida la dha. casa al O. del Apalachicola y empieza en frente de la punta tambien.

324 Un quartillo.

[SEAL.] Sello quarto, un quartillo, año de mil ochocientos diez y ocho y diez y nueve.

O. de la Isla de San Vicente desde allí siguiendo los límites de dhas. tierras hasta el Apalachicola luego el curso y sinuosidades del citado río hasta encontrar el punto de partida de la línea que sirve de lindero al norte frente al ya denominado arroyo de Agua Dulce. Par tanto y en cumplïmiento del ya citado decreto de S. Exa. de diez del corr^te^ año pongo en posecion á la referida casa de Forbes y Compañía de la suerte de tierra descrita; y en su consequencia le declaro é imparto entero y directo dominio á la expresada compañía de la tierra que menciona para

325 Un quartillo.

[SEAL.] Sello quarto, un quartillo, años de mil ochocientos diez y ocho y diez y nueve.

que como propiedad suya la disfrute, posea, renda ó enagene en los términos que mejor le convenga. Eu fé de lo cual mando despachar el presente firmado de mi mano, sellado con el sello de mis armas y refrendado por el infrascrito secretario de este Gobierno y subdelegacion á veinte i tres de { enero / marzo } de mil ochocientos diez y ocho.

Lugar del sello.

JOSÉ MASSOT.
CARLOS REGGIO.

Es conforme a un original que devolvi á la parte que me remitió. Y en virtud de lo mandado pongo la presente. Havana y diciembre diez y nueve de mil ochocientos diez y ocho años. Testado; ingenieros, no vale. Entre reng^s^ á diez. Em^de^ Enero, vale.

[RUBRICA.] MIGL MENDEZ.

326 Los escribanos del Rey, Nuestro Sor., de su Real Colegio de esta ciudad, que aquí signamos y firmamos rectificamos y damos fé que D. Miguel Mendez, de quien aparece tambien autorizado el testimonio que antecede, es también Excr. de S. M. teniente del mayor de Gob^no^ y cabildo fiel legal y de confianza, usa y exerce con aprobacion y á su semijantes siempre se les ha dado entera fé y credito en ambos juicios. Habana y dise. diez y nueve del mil ochocientos diez y ocho años.

[RUBRICA.] JUAN DE DIOS CORONA.
[RUBRICA.] JOSÉ NUÑO DE CUETO.
[RUBRICA.] JOSÉ MANUEL NAVARRO.

(Endorsed:) 210–225–LI. U. S. District Court, Southern District of Florida. Dalcoure *vs.* U. S. Exhibit 3–A. Filed Mar. 17, 1904. E. G. Locke, clerk.

327 B.

Opinion of the commissioners on the claim of John Forbes & Co. on the west side of the River Apalachicola.

This grant for land on the west side of the River Appalatchcola, to the house of John Forbes & Co. appears to have been made on the same considerations with those on the east side, with this difference—that there is an acknowledgment of the intendant that the royal treasury was responsible to the said house for the losses sustained. The land lies in West Florida, and a title is made to the grantees conveying a full and direct property. In this case, as in the first mentioned, there is no negotiation with the Indians for a conveyance, although they are represented as having been guilty of the robberies by which serious losses were sustained. The reasons of this difference are not understood by the undersigned commissioners.

The only question to be decided in this case is whether so large a grant for such purposes could be made without a reference to the King, as was done in relation to the claim of Bastrop and others.

Upon this point we beg leave to refer to our general report upon large claims for an explanation of our views. They are general in their character, as the material out of which they were formed are limited and imperfect. As claims of a similar description have frequently been reported to Congress for their examination, they are believed to be better prepared to decide them than the undersigned commissioners. They therefore respectfully submit the case to their determination.

(Signed) SAML. R. OVERTON,
JOS. M. WHITE,
CRAVEN P. LUCKETT.

NOTE.—Vide first volume, page 414 to 423, for the title papers.

First volume. Record of proceedings. Secretary's book. Containing a record of the proceedings of the commissioners for the settlement of claims to lands in the Territory of Florida. July 15th, 1822.

328 WEDNESDAY, *9th June, 1824.*

The board met. Present, the Honbl. Joseph W. White & the Honbl. Craven P. Luckett.

The claim of John Forbes and Company to a tract of land, undefined in quantity, lying west of the river of Apalachicola was then taken up for examination, and the following title papers and testimony exhibited in support thereof, to wit:

A copy of a letter from John Forbes, partner and principal of the house of John Forbes & Co. to the captain-general of Cuba and the two Floridas, praying in the words and figures following, to wit: "Excellent Sir, John Forbes, partner and principal in the house of John Forbes & Co., established in Pensacola by royal license for the purpose of transacting mercantile business, more especially with the Indians of that province, respectfully showeth to your excellency that during the late warfare between the American Indians and the subjects of Great Britain our interest suffered much as well as in stock as in stores, effects, &c.; indeed, more than can be exaggerated. Many slaves belonging to the company

were carried off and concealed by the Indians during the residence of Colonel Nichols; and though the government of Pensacola, upon being made acquainted with the facts, claimed back their servants, so violently seized upon, it was all in vain; they were never returned. In order to facilitate their restitution, without the royal treasury, although it alone was, and is responsible, my house fitted out at sundry times and with our own pecuniary means, vessels for the sole purpose of demanding them. In the first which sailed for the aforesaid object was Captain Dn. Benigno Calderon, and other officers, with a commission from the Government. Posterior to this, on two other occasions, other persons were commissioned, in order to avoid the withdrawing of public officers from their duties. But all these missions failed in their object of procuring a restitution of the things that were robbed. The same house deputed Edmund Doyle and William Hambly for the same end, giving them considerable gratifications for their
329 trouble and indemnifying the last named for the loss which he suffered of all he possessed. Besides all this, Woodbine induced the Indians, of whom he also got to be named a chief, to carry off negroes, and we had to prosecute him criminally in New Providence, which occasioned us much expence, without being successful, for he had the art or means to escape from the hands of justice. Thus all the efforts and sacrifices made by the house to save the Government from these losses have only served to augment them. At that time of disorder and confusion the said Indians carried off about a thousand head of cattle belonging to the house, which also suffered a loss in another quarter of thirty-eight horses and two mules, and lastly a band of the same set fire to the stores belonging to the house on the Apalachicola, seizing at the same time upon eleven of our slaves, and all the horses, cattle, utensils, and articles there found, without leaving anything whatever behind, and also as prisoners Doyle and Hambly, who justly and reasonably claim of the house the injury and personal prejudice they sustained by such extraordinary and unheard of proceedings. So many losses, including the labor of the negroes, capital, and interest of money, which do not amount to less, on a moderate calculation, than one hundred thousand dollars, should be indemnified by the superior Government to which that of Pensacola is subordinate, either in money or by a compensation to my house of some other equivalent. The losses are clear and positive, and on inspection of the correspondence between the governor of the province and the captain-general's office will suffice to confirm the truth of my exposition; and also on this subject ample proofs can be given by the surveyor-general, Captain Dn. Vicente Sebastian Pintado, Dn. Francisco de Arroyo, of the office of the secretary of the intendency, and other equally distinguished individuals who were in Pensacola in His Majesty's service. Therefore, considering on one hand how difficult it is to pay me in ready money, as ought to be the case, the hundred thousand dollars, to which my house is so incontestibly entitled, on account of the great scarcity of cash in the public coffers; and on the other hand,
330 that besides the many services our house has rendered at all times to His Majesty, with whose means and resources, it may be paid, the troops of the garrison have been sustained, and having still pending and to receive more than eight thousand dollars, we could augment considerably the population of the province without compensation of the

aforesaid sum, if an adjudication were made in full property to the said house of Forbes & Co., which I represent, a tract or round of land which is vacant, and which commences from the creek known as Sweetwater Creek on the River Apalachicola, and runs directly west as far as the River Choctawhatche, following the course of the said river to its mouth, on the Bay St. Rosa, thence eastward winding along the shore of said bay and the sea to the boundary of the lands on the west of the Apalachicola, formerly ceded to our house by the Indians, and running along the western boundary of said lands up the said river to the point of departure. I am aware that this land which for the greater part is not capable of being cultivated will not compensate for the fourth part of the sum which we claim, because the amount of our losses exceeds, as I have said, one hundred thousand dollars, but, however it may be, this will be an additional incentive to the loyalty and obedience which we profess to our sovereign, and we do not wish that His Majesty should feel the detriment of such a large reimbursement, contenting ourselves with the hope that time and our industry may be productive of benefit to the said province, and augmentation to the royal treasury patrimony. Wherefore I pray your excellency that in virtue of the recommendations contained in the correspondence between the commandancy of Pensacola and this Government concerning the above-mentioned losses; and the information which I shall shortly furnish in proof of them, you will be pleased to adjudicate in full property to the house of Forbes & Co., of which I am principal, and which I represent, the tract of land above designated, according to the points and boundaries explained, delivering the necessary title of possession, with which we shall rest satisfied, content, and compensated for the claims of losses and indemni'es demanded, &c., &c.—(Signed) Dn. Pedro de Antonia de Ayala. John Forbes." Also a copy of a decree of the captain-general,
331 dated Havana, 5th January, 1818, as follows: "To be shown to the assessor-genl. that he may advise that which corresponds. (Signed) Cienfuegos. Miguel Mendez." Also a copy of notification to John Forbes (signed) Mendez. Also a copy of decree of the captain-general, dated Havana, 5th of Jan., 1818, as follows: "Having been inspected let the petition of the house of John Forbes & Company, above mentioned, be received at the notaries' office, who is charged therewith, and let the testimony prayed for be taken, clothed with the usual forms, which done let them be returned along with the foregoing. (Signed) Cienfuegos. Del Monte. Miguel Mendez." Also a copy of a notification of the same to John Forbes on the same day by Miguel Mendez. Also a copy of a decree of Ramirez, the intendant general, dated Havana, 7th January, 1818, as follows: "Let it be done without prejudice to this jurisdiction. (Signed) Ramirez, Campuro, Miguel Mendez." Also a copy of a deposition in the following words, to wit: "I went to the house of Francisco Guiterres de Arroyo, former secretary of the intendancy of West Florida, and now belonging to the intendancy-general subdelegated, who, having taken the oath, usually prescribed to tell the truth, and being examined as to the tenor of the petition of John Forbes, after having carefully perused it, declared: That having resided in Pensacola from February, 1806, in the discharge of his office, he could testify as an ocular witness that the acts alleged, for which an indemnity is demanded, are so certain and positive that no impartial

person in that province can refuse to acknowledge. That the losses were enormous, not only in Pensacola but also in the stores which the demandants held on the River Apalachicola and Perdido; that the Indians carried off the slaves on their establishments, concealing them during the residence of Colonel Nichols in that quarter, notwithstanding the remonstrances of the Government on the commissions given afterwards to Dn. Benigno Calderon, captain of the Louisiana Regiment, and other officers as well as to various individuals; so that in the opinion of the department there is no exaggeration in the sum of one hundred thousand dollars asked for as an indemnity for the
332 aforesaid losses, comprehending more than one thousand head of cattle, yokes of oxen, draft horses, and all the utensils and other articles which were taken off from the stores of Forbes by the aforesaid Indians, for which not the smallest compensation has been received by the said house; it having also been the only one in Pensacola which has rendered important services to the sovereign. The respondent likewise declared that the above deposition is the whole truth in virtue of oath; that he is fifty-five years of age; that the dispositions of the law do not affect him, &c., &c. (Signed) Franco. Guiteres de Arroyo. Before me, Miguel Mendez." Also a copy of another deposition as follows: "In the city of Havana, same day, month, and year, I went to the house of Dn. Vicente Sebastian Pintado, His Majesty's surveyor-general, who, having made to me the customary oath, to say the truth, and being examined in the same manner as the preceding deponent declared: That during his residence at Pensacola it has come to his particular notice that in the various conflicts between the American Indians and the subjects of Great Britain, the house of Forbes & Co., established there by royal licence for trading with the Indian tribes, suffered the most serious losses, as well in Pensacola as at the Perdido and Apalachicola rivers by the aforesaid events and causes; and although the deponent cannot state amount of these losses and injuries, he thinks they must be very considerable. That said house has rendered most important services at all times to the troops of that station, as well as to our Lord the King (ample proofs of which are to be found in the office of the secretary of the Government). The respondent affirms all this to be the truth in virtue of his oath, &c., &c. (Signed) Vincente Sebastian Pintado. Before me, Miguel Mendez." Also a copy of another deposition, as follows, to wit: In the city of Havana on the same day I went to the domicile of Dn. Franco. Guerrero, captain in the Louisiana Regiment, who, having made the usual oath and examined as above, declared: "That during his long residence in Pensacola he knew very positively that in consequence of the warfare between
333 the American Indians and his Britannic Majesty's subjects that serious losses were suffered by the house of Forbes & Co.; that at the time Col. Nichols was in that quarter the same Indians carried off and concealed a number of their negroes; that the same happened when Woodbine made himself their chief, and compelled them to steal away negroes, and commit other acts of atrocity; that they carried off the quantity of cattle, oxen, and horses specified, after destroying the stores which belonged to the said house on the rivers Apalachicola and Perdido; that though sundry steps were taken by the Government in order to procure the restitution of the immense property of Forbes & Co., no

pillaged, nothing was returned, so that the house was necessitated to claim the same of the Sovereign, who was responsible for them. That there is no doubt the losses sustained, do amount to the sum of $100,000, as well by an approximate calculation as for the important services which that house has ever rendered to the troops of that station, and to our lord, the King (proof of which may be found in the secretary's office of this Government). He also attests to the truth of the above, &c., &c. Francisco Guerrero. Before me, Miguel Mendez." Also, a copy of another deposition, as follows: "In the city of Havana, same day I went to the house of Dn. Francisco Moralles, captain in the Louisiana Regiment, who, having taken the usual oath, &c., declared, that having long residence in Pensacola, and chiefly during the warfare between the American Indians and the subjects of Great Britain, he well knows that the house of Forbes & Co. suffered the losses expressed in the first of the preceding documents, &c., &c. (The rest of the deposition is the same as the preceding). (Signed) Francisco de Paulo Moralles. Before me, Miguel Mendez." Also, a copy of the grant, or title in form, as follows: "Havana, 10th January, 1818. Having inspected the above, together with the preceding documents, which were ordered to be sent to the assessor by decree of the 6th instant. Taking into consideration the merits of the case, in which it appears that the house of Forbes & Co., established by royal permission in Pensacola for the purpose of trading with the Indian tribes, claims an indemnity of $100,000
334 for losses of various kinds sustained during the warfare between the American Indians and the subjects of Great Britain, and during the residence of Col. Nichols in that province, and also when Woodbine, making himself their chief, instigated them to commit all kinds of robbery, upon all which the necessary representatives were at that time made, without effecting a restitution to the said house of Forbes & Co., of any of the negroes, animals, or other property of which they were unjustly spoiled; and on the other hand considering that the tract of land which they ask an adjudication of, in payment and compensation of the aforesaid sum, can never equal that amount in a province of such small population where the lands remain without cultivation, and no one turns his attention to improve them, according to the information which his Majesty's surveyor-general Dn. V. S. Pintado has received; but that entering into the possession of John Forbes, principal partner of said house, he will have the means of turning the said tract to use, by introducing colonists thereon, and making beneficial to the State that which lies at present waste and abandoned; which considerations moves his Majesty, in a royal ordinance of the 10th August, 1815, to offer lands to those who were willing to establish themselves in the island of Porto Rico, as the most advantageous mode that could be employed for increasing population. Therefore, his excellency, making use of the faculties vested in him, has granted, and by these presents, does grant the said tract of land to John Forbes & Co. under the points and limits designated in the first of the preceding documents, the said house remaining without any right or claims upon the royal treasury for the losses and injuries it has sustained, and with the value of the said tract whatever it may be, remaining compensated for everything, and the demands of said house for indemnity canceled; and the governor of Pensacola, in virtue of this resolution, shall put it in quiet and peaceable possession of said tract, his excellency

ordering the necessary documents to be delivered to the said house and the original to remain in the archives. (Signed) Cienfuegos, Del Monte,
335 Miguel Mendez." Also, a copy of a petition of Dn. Colin Mitchel, agent of the house of Forbes & Co., as follows: "Excellent Sir: The house of Forbes & Co., of Pensacola, through their attorney in this city, respectfully represents that in the most of the confusion in the public archives of that place, occasioned by the entry of the American army, they have preserved the act, or original decree expedited by Dn [illegible] Masot, political and military governor of the province of West [illegible] in consequence of that issued by this supreme Government re[illegible] indemnity for losses claimed by this petition; and having occa[illegible] two copies of the latter, one of which to be annexed to the doc[illegible]ent existing in Pensacola, and the other for their own use, supplicate your excellency to order the same to be delivered, &c. (Signed) Colin Mitchel." Also, a copy of a decree thereon, as follows: "Havana, 18th December, 1818. Having seen by the foregoing document what it expresses, let the testimony prayed for by the house of Forbes & Co. be given to them. (Signed) Cienfuegos. (Countersigned) Del Monte, Miguel Mendez." Also, a copy of the act of possession given by Governor Masot, as follows: Don Jose Masot, &c., &c.: Whereas and in obedience to the above superior decree of his excellency, the captain-general of the province, of the 10th instant, by which, as an indemnity, is conceded to the house of Forbes & Co. a tract of land situated between the River Apalachicola to the east, and the Choctawhatchie to the west, the ocean to the south, and on the north by a line beginning opposite to the creek known by the name of Sweet Water Creek, situated on the eastern side of Apalachicola, about three and a half miles north of the bluff, known by the name of Alum Bluff, and running west to the Choctawhatchie, thence following the sinuosities of said river to its mouth, on the Bay of St. Rosa, thence winding along the eastern shore of the same to the sea, the high waters of which form the limits to the south, and till the line joins the limits of the lands formerly acquired by the said house on the west of the Apalachicola, in front of the island of St. Vincent, thence
336 running along the limits of said lands to the river Apalachicola, then the course of said river to the point of departure of the line serving as the northern boundary line, opposite the aforesaid creek, called "Sweet Water Creek." Therefore, and in obedience to the said decree of his excellency of the 10th instant, I put the said house of Forbes & Co. in possession of the tract of land above described and in consequence declare and impart to them full and direct property in the said land, so that they may the same enjoy, possess, sell, or transfer as they may judge proper, &c. Pensacola, 23d January, 1818. (Signed) Jose Masot. (Countersigned) Carlos Reggio. All which foregoing documents are certified to be true copies by Miguel Mendez, second escribano of the Government and Cabildo, on the 19th December, 1818, whose signature as such is accredited on the same day by Roman Alvarez, Jose de Galinor, and Lorenzo Hodro, notaries public of the city of Havana. Also, an original order of ejectment given by Governor Callava, in the following words, to wit: "Dn. Jose Callava, civil & military governor, &c., &c. In consequence of the renewed application of John Innerarity, esq., I order and command, all and singular, person or persons who may have occupied or established themselves on the

lands or territory belonging to Messrs. John Forbes & Company, situated and bounded by and between the rivers Choctawhatche and Apalachicola, unless by special permission of, or agreement with the said Messrs. John Forbes & Co., that they shall definitively remove from the same within the peremptory term of ten days after the notification of this order, and in case of noncompliance within the time specified they will be proceeded against according to law. The notification and execution of this order is entrusted to Mr. Jonathan Bunker, and for the better confirmation thereof it is to be trasnslated into English by Dn. Jose Ignacio Cruzat, which translation he is to extend and sign in continuation of this my order. Given in Pensacola, signed with my hand, sealed with the shield of my arms, and countersigned by the undersigned secretary of this Government, this 8th day of October, 1819. (Signed) Jose Callava. (Countersiged) Carlos Reggio."

337 The signatures to the transcript from Havana and to the foregoing order of ejectment proven by Joseph E. Caro by comparison of handwriting. See the letters of Manuel Gayoso de Lemos and Marques de Caso Calvo, governors-general of Louisiana and West Florida, recorded at pages 383 & 384.

Charles Evans, being sworn, saith that on the return of the grant for said tract of land made to the house of John Forbes & Co. by the captain-general of the island of Cuba and both the Floridas, there was a decree of Governor Masot putting the grantees in possession thereof, which possession they have held ever since; that a number of improvements have been made on the different parts of the said tract by persons claiming under the grantees; that in the year 1819, at the request of John Innerarity, Governor Callava issued an order ejecting a number of intruders, some of whom were imprisoned for disobedience of the order. And further saith not.

Desiderio Quina, being sworn, saith that he is acquainted with all the foregoing facts stated by Mr. Chs. Evans, and further saith that the said house, and those claiming under it, have held actual possession of the said tract of land ever since the year 1818, by virtue of a grant from the captain-general of the island of Cuba and the two Floridas and a decree of possession given by Governor Masot. And further saith not.

And then the board adjourned.

NOTE.—Vide page 271 of the 2d volume for the opinion.

Office of the United States surveyor-general for the district of Florida.

I, Edmund C. Weeks, United States surveyor-general for the district of Florida, do hereby certify that I am the lawful custodian of the original records of the board of commissioners appointed for ascertaining claims and titles to lands within the Territory of Florida under the act of Congress approved May 8th, 1822, and acts amendatory and sup-

338 plemental thereto, and such original records are in the office under my charge. I further certify that the foregoing page numbered one is a true and correct copy of the opinion rendered by the said board of commissioners on the claim of John Forbes and Co. for land on the west side of the river Apalachicola as the same appears of record in Book B of the original records of said board of commissioners, entitled "Second Volume, Record of Proceedings, Secretary's Book," upon pages 271 and 272 of said records.

I further certify that the foregoing pages, numbered from two to thirteen, inclusive, are a true and correct copy of the record of said board of commissioners in the claim of John Forbes and Co. as the same appears on pages 414 to 423, inclusive, of the record Book A of said original records of said board, entitled "First Volume, Record of Proceedings, Secretary's Book, containing a record of the proceedings of the commissioners for the settlement of claims to land in the Territory of Florida. July 15th, 1822."

Witness my hand and private seal, having no seal of office, this 23d day of November, A. D. 1903.

EDMUND C. WEEKS, [SEAL.]
U. S. Surveyor-General for the District of Florida.

(Endorsed:) # 210. P. 225. L. 1. U. S. District Court Southern District of Florida. Dalcour vs. U. S. B. Filed in evidence by complainants' solicitors and marked "Exhibit B," Dec. 28, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk. Note. (State Papers to be marked "Exhibit C.")

339 (E)

No. 22680.

United States of America, Department of State. To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 31st day of October, A. D. 1903, and of the Independence of the United States of America the one hundred and twenty-eighth.

[SEAL.] JOHN HAY.

Translation of a note from the principal secretary of state of H. C. M. to the minister of the United States.

SIR: In consequence of the notes addressed by your exc. to this department on the 2d of Aug't, 1830 and 15th of last month, requesting that a careful inspection of the archives of the Govt. should be made for the purpose of procuring you certain documents which are wanted in the courts of justice of the United States in order to decide on the right of certain titles to land in Louisiana; his Majesty the King, desirous of obliging your exc's Govt., has been pleased to command that said archives be inspected and examined for the purpose expressed by your exc. I accordingly transmit under this date the necessary orders to the department of finance for the Indians, and to those, of grace and justice, and of war, as also to the keeper of the archives of this office. But I must observe to your exc. that it is not customary to allow the intervention of private agents in affairs of this nature, and that the business
340 must be performed exclusively by his Majesty's officers, on whom rests all the responsibility.

I at the same time transmit to your exc. a duplicate of the order communicated to the captain-general of Cuba for the delivery of the documents belonging to the archives of the Floridas, which your exc. believes are to be found in some of the dependencies of that island.

I embrace this opportunity of renewing to your exc. the assurance of my consideration & esteem, and have the honor to be

Your most obed. servt.,

(Signed) F. T. CALOMARDE.

At the Palace, Feb. 15, 1832.

Translation of an order communicated by the Department of State of H. C. M. to the captain-general of the island of Cuba.

SIR: The minister of the United States having represented to his Majesty's Govt. that there still exist in the dependencies of the island of Cuba certain documents belonging to the archives of the Floridas, which, agreeably to the 2d article of the last treaty, ought to be delivered to the United States; his Majesty has been pleased to order that your exc. shall direct said documents to be searched for and delivered to the person authorized by the American Govt. to receive them; which person will, perhaps, be able to explain to your exc. the nature of those documents and the office where they may be found.

I communicate to your exc. the foregoing under his Majesty's authority, and, expecting your immediate execution of the order it con-
341 tains, I pray God to preserve your exc. many years.

Madrid, 15th Feb., 1832.

(Signed) CALOMARDE.

(Endorsed:) 210–225–L. 1. U. S. District Court, Southern District of Florida. Dalcour vs. U. S. E. Filed in evidence by complainants' solicitor as Exhibit E., Dec. 28, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk.

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357 EXHIBIT F².

P. 306.

An extract from No. 11, The Index "containing the general circumstantiated statement of all the lands, lots, and waters which were sold, granted, given or distributed from the aforesaid year 1801 to 1818, inclusive, p. 306 of the "Expediente" in the State Department.

INDICE DEL NO. 9.

Tierras que se concedieran en indemnizacion de daños y perjuicios:

Nombres de los indemnizados.	Coorden numero en relacion.	Situaciones.	Arpanes planos mas o' menos.
F. Forbes, Dn Juan y compañia.	Unico	Chata Hatcha y Apalachicola.	1,500,000

INDEX OF NO. 9.

Lands granted in indemnity of damages and injuries:

Names of the parties indemnified.	Coorder number in relation.	Situation of the lands.	Plat arpents more or less.
F.			
Forbes, Don Juan & Co....	Only one ..	Chata Hatcha & Apalachicola.	1,500,000

(312 in Spanish, following above in the exhibit is omitted by agreement of counsel, the translation attached thereto being as follows):

[Translation.]

Third. Among the aforesaid in the archives of the secretary of this superintendency general subdelegate of the royal finances of the island of Cuba, records and titles, there is an exact copy of the official documents (testimonio), which I have had furnished me of the grant made by the judicial decree of the captaincy-general of this island and both Floridas to the aforesaid firm of Forbes and Company, of lands situated in west Florida, in compensation of losses and injuries (see No. 9 of the
358 general account of the grants made in that province), but although the said copy is on paper with the proper stamp, and although it seems it ought to be attested by the deputy of the escribano of the Government and the corporation of the city, Don Miguel Mendez, now dead, this formality was omitted, either by being overlooked or because it was considered sufficient to have a plain copy for minute account or for the purpose of notice in the office of the secretary of this intendency and superintendency general; and I had omitted to note when I wrote the said No. 9 that I did it in conformity to what I myself had made a copy of when the authenticated official record (testimonio), which is there mentioned was furnished me; nevertheless for greater security I requested that the primitive and original expediente be exhibited to me, and it was placed in my hands and I demanded an authenticated official copy (testimonio autentico), which was given by the escribano of the Government Don Manuel de Ayala, on the 10th of February of the present year, 1824, by authority of a previous decree of his excellency the president governor and captain-general of the 28th of January of the same year, registered at the instance of Don Colin Mitchell, representative of said firm, and who left it in my possession.

* * * * * * *

359 [Translation.]

Page 336.

The number 9 is the detailed account of the grant of a large tract of land made by the captain-general of this island and both Floridas on the 10th of January, 1818, to the firm of John Forbes and Company by way of indemnity for the damages and injury they suffered.

360 Copy of a portion of the Expediente in the State Department paga 368, Arpanes con-cedidos por ~~indemni acion~~ indemnizacion y pago de perdidas, daños y perjuricios Por la concesion 1,500000 arpanes de tierra que se hizo en 10 Enero de 1818, por el Exmo Sr Capitan Gl. de esta isla que lo fué tambien de ~~amblas~~ ambas Floridas por indemnizac^{n}, y pago daños y perjuicios que se grand uaron en 100') o mas P^{s} segun la razon n'g del proprio agri ~~neusem~~ mensor Genl. 1,500,000 arpanes.

Demonstracion.

	Arpanes	Pote
~~Yo concidides por indemnerac y pago de danos y perjuicos 1,500,000 arpanes~~ Arpanes vendidos	772. 482	$\frac{1}{1}\frac{3}{0}\frac{1}{0}$
Yd donado graciosonente n	531. 665	$73\frac{1}{8}\frac{2}{8}\frac{1}{3}\frac{1}{3}\frac{1}{6}$
Yd concedidos por indemnizaco y pago de daños y prejuicios	1500. 000	
Total gral	2804. 147	$73\frac{1}{1}\frac{3}{0}\frac{1}{0}\frac{1}{3}\frac{1}{3}\frac{1}{6}$

~~Translation of the above~~

page 368 Appents granted as indemnity and pay for losses and damages and injuries.—

By the grant of 1,500,000 arpents of land which was made on the 10th of January 1818 by the ~~written decree of the~~ Exm Captain General of this Island ~~and~~, who was & also of the ~~two~~ both Floridas as indemnity and pay for the damages and injuries valued at 100,000 dollars which according to ~~the~~ N^{o} 9 of said surveyor Genl. note ~~decree there was granted 1,500,000 arpents~~ 1.500.000 arpents ~~Inventory~~ Summary of what precedes:

~~I have granted as indemnity and in pay for damages and injurious 1,500.000 arpents~~

	Arpents	Part
Arpents sold	772. 482	$\frac{1}{1}\frac{3}{0}\frac{1}{0}$
Ido donated gratuitously	531. 665	$73\frac{1}{8}\frac{2}{8}\frac{1}{3}\frac{1}{3}\frac{1}{6}$
do given as indemnity and payment for damages and injuries	1500. 000	
	2. 804. 147	$73\frac{1}{1}\frac{3}{0}\frac{1}{0}\frac{1}{3}\frac{1}{3}\frac{1}{6}$

(Endorsed:) "210–225–L. I. U. S. District Court, Southern District of Florida. Dalcour vs. U. S. F. No. 2. Filed in evidence by complainants and marked Exhibit F. No 2, Dec 30, 1903. R. B. Archibald, special master. Filed Mar 17 1904. E. O. Locke, clerk."

(NOTE BY CLERK.—This page 360 is a facsimile of the paper copied. The erasures (lines run through words) and insertions in ink and lead pencil are just as they appear on document copied—E. O. LOCKE, *Clerk.*)

361 (G.)

Translation of extracts from a document in the States Department entitled "Copy."

Year 1822.

No. 226. 1st memorandum royal orders.

Complete copy of the expediente, made by royal order, April 29th, 1822, which commands that a minute account of the donations of land made in the Floridas and recorded in this administration be forwarded to His Majesty, reading as follows:

Royal crier, department of the colonies: The King wishes your excellency to make and remit with the greatest speed, to this administration of which I have charge, a minute account of the donations or grants of land recorded in that office to have been made in the Floridas, procuring to enumerate with perfect clearness the concessions made to Spaniards, as upon this detail and speed depends their acknowledgement by the United States, which by royal order I communicate to your excellency for its speedy accomplishment.

God preserve you many years.

Madrid, April 22nd, 1822.

GAMBLEY,
Intendant General of the Army of Havanna.

Decree.

Havana, July 27th, 1822. Let it be done. For which draw up an expediente, heading it with a certified copy of this royal order, and immediately inform the ministers of all the national departments.

Pinillos.

It is a copy.

JUAN NEPUMOCENO DE AROCHA.

Another.

Havana, August 3rd, 1822. Let the ministers of the departments report as I have commanded in my decree of the past proximate. Pinillos.

Report:

362 General Intendant of the Army: There is no evidence whatever in this department under our charge from which can be filled the above royal order, but it might perhaps be found in the archives of the secretary of subdelegation of both Floridas, although in regard to West Florida we are informed that the surveyor-general, Capt. Don Vicente Sebastian Pintado, carried a register of the grants made from the year 1806. He may be able to furnish the information desired.

Your excellency will proceed to take such steps as he may deem proper.

Havana, August 8th, 1822. Only on account of business engagements of the treasurer it is signed by Ayala.

Decree:

Havana, August 26, 1822. Let Captain Don Vincente Sebastian Pintado inform with the proper minute enumeration all he knows of the matter contained in the decree, that we may fulfill with the greatest speed the enclosed royal order provided by His Majesty. Pinillos.

Report:

Your Lordship, Commander and Superintendent: Gen. subdelegate. Regarding the matter disposed of by your excellency in the above decree in reference to that provided in the royal order of April 29th of the current year of which a certified copy preceded, and as to the knowledge in my possession, if I am to furnish your excellency, as commanded with a detailed accurate account, I shall require the assistance of some one, that is a clerk, and if possible I should like it to be Don Matias Bauve, a public officer of Pensacola, formerly attached to the treasury of the army and national finances. Havana, September 9th, 1822.

VINCENTE SEBASTIAN PINTADO.

Decree:

Havana, Sept. 21st, 1822. Let the secretary of this superintendency after having examined paragraphs 3, 4, and 5, proceed to investigate if in the office under his charge are extant the above indicated information, and the best manner of sending them clear of obstacles to Capt. Vincente Pintado, that he may discharge his duty with better knowledge and extension. Pinillos.

Report:

The Intendant General of the Army: To better accomplish the preceding decree of your excellency, it seemed to me more opportune that at the examination of the papers which the official archivist should make, that Capt. Pintado should join him, and having proposed it to him,
363 he most willingly consented to its performance, which was accomplished with the utmost diligence, selecting from those received from Pensacola and deposited in his office those specified in the enclosed inventory conductive to the object of this expediente. The only legal proceedings required in their delivery should be the signature of Capt. Vincente Pintado, as out of respect for the character and position of the above-mentioned captain, no other formality is required than to sign the inventory referred to as security to this secretary, under condition that they be returned on completion of the work which they have served to facilitate. Nevertheless, your lordship will decide as seems most convenient. Havana, October 10th, 1822. AROCHA.

Decree:

Havana, October 21st, 1822. Allow the said Captain Vincente Sebastian Pintado, with all due respect and regard asked for him, to find the concessions or grants of land made by the Seminole or Lower Creek Indians, and confirmed by the commandancy and government of West Florida, and also those made by the captain-general as expressed in his fifth remark and which may be deduced from existing documents and other information in his possession. Let the said Pintado regulate the dates and boundaries with the clear-sighted fitness of time in the delineations No. 6 and 7, and explain especially all that he judges convenient for the object of our high Government, which, no doubt, should be to protect in its dominions the owners of the property acquired legitimately under the Spanish authorities, thus releasing the nation of the responsibility of reimbursing the owners of these grants, a situation to which they might otherwise be exposed. Engage Don Mathias Bauvé or any other competent clerk for the purpose requested, to which effect communicate the official report to the other ministers. Make a memorandum of this.

In order that Captain Pintado begin his work without delay and send the report to the tribunal of accounts, so that they may supply the data extant in their treasury, and inform with all possible speed whatever presents itself and seems to him of importance in the business set forth in this decree by official letter.

PINILLOS.

Note:

The same day the order regarding the clerk was made known
364 to the administrations.

AROCHA.

Entry of decree:

On Oct. 23rd, 1822, I entered the decree in the proceedings for the purpose therein expressed.

VINCENTE SEBASTIAN PINTADO.

No. one:

Detailed account of the lands, water, and lots which were sold, conceded, and distributed by the Spanish authorities in West Florida from the year 1801 to 1818, inclusive, specifying the name, nativity, and residence of the purchaser, concessionaries, and grantees, the surface of the lands and waters, number of lots received, either by purchase, donation, or distribution, their repective situation, the record begun, and other particulars conducive to fulfill the object of the royal order of April 29th, 1822, and decrees of this administration and superintendent general subdelegate of national finances set forth on Oct. 21st of the same year in the expediente, which matter has been officially followed by the same superintendent.

* * * * * * *

No. nine:

Detailed account of the concession of a large grant of land in West Florida by the captain-general of this island and both Floridas in decree registered January the 10th, 1818, to the house of Don Juan Forbes and Co. established in said provinces by royal permission as indemnity and pay of losses, thefts, damages, and injury which it suffered, for reasons which will be related, and estimated to be worth the sum of one hundred thousand dollars or more, with the express condition that said house or firm would consider themselves satisfied without being able to claim any other compensation whatever from the public treasury.

This report is part of the general report of all the lands, lots, and water sold in the above-mentioned province from 1801 to 1818. Description of tract conceeded.

The natural and artificial limits and boundaries are clearly as follows:

Beginning on the western banks of the Apalachicola River, at a point opposite the mouth of the creek known as Sweet Water, which flows
365 into said river, and on its eastern shore, some twenty or twenty-two legal English miles towards the south ¼ southwest by compass touching the mouth of the River Flint, in the direct distance from which point runs or ought to run a straight line to the west of the compass until it reaches the eastern banks of the river Chata Hatcha following this same bank, excluding the islands, as far as the mouth of the Ste. Rosa Bay. Coasting this to the east and meridian until it comes out at the Pass of the Eastern or Eastern Pass, from thence following the shores

of the sea or Gulf of Mexico towards the southeast, including the island of St. Andres as far as the bend of the coast at Cape St. Blas, and falling on the most western point of the island of St. Vincent, south 14 degrees west of the magnetic needle, where another tract begins claimed by the same firm, and which runs to the western banks of the above-mentioned Apalachicola, from its mouth to the arm which goes to Lake Winico; after following the land granted, going up the most western banks of said river Apalachicola until reaching the same point on the opposite side of the Sweet Water Creek, where it terminates.

The surface or area of this tract of land and water is estimated to be, more or less, one million and a half arpents, Paris measure, 1,500,000.

Steps which preceded and followed the concession and decree registered was granted according to the testimony of the expediente circumstances connected with the business arranged and directed and disposed of in this administration and superintendency general, in decree of Oct. 21st, 1822, according to royal order of April 29th of same year.

At the beginning of January, 1818, the petition of which this is a copy was presented.

Your excellency, Don Juan Forbes, director and partner of the firm of Forbes & Co., established under royal permission, in the town of Pensacola, to do a mercantile business, particularly with the Indians of that province, appears before your excellency in the manner authorized by law, and states that, during the movements and action of the last war sustained between the American Indians and the subjects of Great Britain, our interests have suffered as well on our plantations as in our warehouses, more than can be expressed with all exaggeration.

Many of the slaves belonging to the firm were kidnapped and
366 hidden by the Indians during the stay of Col. Nicholas in this post, although the government of Pensacola, being cognisant of the fact, requested vigorously the return of the slaves. It was all in vain; none of them were returned. To facilitate their restitution, without further loss to the royal exchequer, whose expenses were great and who is responsible, the firm fitted up vessels on various occasions at their own expense to coast the waters and try to reclaim them. In the first vessel that went out for this purpose, the governor commissioned the captain of the regiment of Louisiana, Don Benigno Calderon, with other officers. After this on two occasions we sent special agents so that the public employees should not be forced to absent themselves from their duties. The result, however, of these undertakings were always the same—that of not obtaining the stolen property. The same firm commissioned Edmond Doyle and Guilliano Hambly for the same purpose, paying them large sums for their work and giving an indemnity to the last named for all the losses he sustained. More than this, Woodbine instigated the Indians, of whom *of whom* he also made himself chief, to steal negro's, and we were obliged to pursue them and institute criminal proceedings in the province, which cost enormous sums of money, with no good results, because they had the art of escaping the clutches of the law; therefore all efforts and sacrifices made by this firm to save the Government from losses have only been to increase them.

During the same time of turbulence and disorder, the Indians carried off a thousand beasts belonging to the company, losing at another place

thirty-eight horses and two mules. And at last a party of the same Indians set fire to the warehouse of the firm in Appalachicola, carrying away eleven of our slaves with the whole drove of horses and other implements and chattels without leaving a single thing, and taking also as prisoners Doyle and Hambley, who with reason and justice claim of the firm damage and injury, personal and otherwise, which they sustained, through such strange and unheard-of proceedings. Such large losses, including the labor of the negro's, capital, and interest of money, does not come to less than one hundred thousand dollars. We should receive this indemnity from this superior government to which Pensacola is subject, compensating my firm with money or its equivalent.

367 The losses are positive, and it suffices to cast a glance at the correspondence in this matter carried on between the commandant of the province with this captain-generalcy to leave no doubt in the mind of the veracity of my statement, for which I can also give full proof by the surveyor-general, Capt. Don Vicente Sebastian Pintado, Don Francisco Arroyo, in addition to that of the secretary of this administration and other equally respec'able individuals who have been in Pensacola under Your Majesty's service.

So then, considering on one side how difficult it will be to pay me in sound money, as should be done, the hundred thousand dollars which is undoubtedly due my house, on account of the scarcity of money in the public treasury, and again for the many services rendered at all times for Your Majesty, with which resources it can be said the army stationed at that post has been maintained, having still a debt against you of over eight thousand dollars, it would increase considerably the population of the province if, in compensation of the above-mentioned sum, you would appropriate in absolute title and right of possession to the above-cited company of Forbes, whom I represent, a tract of land which is unclaimed, and begins at the creek known as Sweet Water in the river Appalachicola, following westward in a straight line until it strikes the river Chata-Hatcha, following the course of said river to where it empties in the bay of the island of Ste. Rosa, going towards the east on the shores of the same bay and the sea until it strikes the boundaries of the land to the west of the river Appalachicola already ceded to our firm by the Indians, following the course of the same river to its mouth.

I know very well that the above-mentioned land, much of which cannot be cultivated, does not compensate even the fourth part of the sum I claim on account the amount of losses and damage experienced, as I have said, amounting to more than one hundred thousand dollars, but what can be done? This will be a new motive for increasing the love and constant loyalty that my partners and myself profess for our sovereign. Not wishing that Your Majesty should feel the loss of so large a sum of money disbursed, we content ourselves with the knowledge that our industry and time alone will make this of some benefit to the province, thus increasing your royal patrimony.

368 Therefore we request your excellency, on account of the merit of the above statement, which can be verified in the correspondence between the commandant of Pensacola and the Government regarding the damages narrated and the information which can be well testi-

fied to prove them, you will decree in full dominion this tract of land designated under the boundaries as set out to the firm of Forbes and Co., of which I am manager and which I represent, dispensing with the necessary interlocutory decree which confirms the possession, with which we guarantee ourselves satisfied and compensated for the claims of indemnity and damage asked.

It is in justice that I ask it, swearing that it is not in malice, and what is needful, etc.

JUAN FORBES.

PEDRO ANTONIO DE AYALA.

By decree of Jan. 5th, his excellency sent the preceeding petition to the assessor-general to provide suitable returns, and authorized decree of the same day; they sent to receive the information advanced, intrusting it to deputy notary for the governor and directing them to grant the required assistance. By decree of the 7th of the same month, the commander of the army, the superintendent-general, lent his aid and ordered its accomplishment without injury to his jurisdiction.

Having received the information, it proving to be true and in accord with that presented by the firm referred to, there was issued on the 10th of the referred to January, 1818, the recorded deed or decree of concession of the following tenor:

Examined and found correct with the preliminaries, which were ordered to pass the proposal made in writing by the interlocutory decree of the 6th of the present month, considering its merits as produced in this expediente. In as much as the firm of Forbes and Co., established under royal permission to carry on commerce with the Indian tribes, claim indemnity of one hundred thousand dollars losses it has sustained by damage during the movements and actions between these same American Indians and the English subjects of Great Britain during the stay there of Capt. Nichols, and when Woodbine made himself chief
369 of the Indians instigating them to commit all manner of robberies for which at the time claims were made without success to return to the said firm of Forbes & Co., the negro's and other animals and goods, of which they were unjustly despoiled, and on the other hand that the tract of land which they ask to appropriate in payment and compensation of the sum expressed, can never bring such a price in a province so sparcely settled, there being no one to devote themselves to their cultivation, according to information obtained including that of the surveyor-general of Your Majesty, Don Vincente Sebastian Pintado, and that by coming into the possession of Don Juan Forbes, principal of the said firm, it may benefit it and attract colonies to establish themselves on it, accruing to the benefit of the state, which at present is uncultivated and abandoned; considerations which moved the worthy spirit of His Majesty, so that by royal letters patent of August 10th, 1815, they offered lands to those who wished to locate on the islands of Puerto Rico, as the most suitable means which can be employed to increase a population; Therefore, in conclusion, your excellency said that exercising the authority vested in him, it has been adjudged, and I do adjudge and grant the above-mentioned land to Don Juan Forbes and Co., under the consideration and boundaries set forth in the first leaf of this document, prohibiting

him from claiming any dues from the royal treasury for losses or damages which he may have sustained, since with its value, be that what it may, he remains compensated in toto, and cancelled his established demands for indemnity. The commandant of said town of Pensacola, in virtue of this decision will place him in quiet and peaceful possession of the above-mentioned land, to which attainment his excellency ordained that the same firm of Forbes be given the necessary official titles, recording the originals.

Office of the assessor. Thirty-two dollars paid.

CIENFUEGOS. DEL MONTE. MIGUEL MENDEZ.

In December of the aforesaid year, 1818, the aforesaid house presented a memorial which is literally inserted with the decree made.

Your Excellency: The firm of Forbes & Co., merchants of
370 Pensacola, through their agency in this city, say to your excellency that in the midst of the perplexity and confusion occasioned in the public archives of that city by the entrance and taking possession by the American army, he preserved the original decree which was executed by Col. Don Jose Masot, political and military commander of the province of Florida, in consequence of the one decree of this Superior Government, for the indemnity and damages obtained by the petitioners.

It being convenient and proper that he should have two official copies, one of which he may attach to the record preserved in Pensacola and one to retain for himself. He therefore begs your excellency to order the Government notary public to supply him the two authentic copies asked for, a favor implored. Havana, Dec. 17th, 1818.

COLIN MITCHELL.

Havana, December 18th, 1818. Transmitted to the assessor-general.

CIENFUEGOS.

Havana, Dec. 18, 1818. Examined and found correct.

See that the document is furnished the firm of Forces and Co., as the evidence they have solicited.

CIENFUEGOS. DELMONTE. MIGUEL MENDEZ.

The document referred to in the preceding business is of the following tenor:

Don Jose Masot, col. of royal corps of artillary, political and military commander of the province of West Florida, subdelegate of royal exchequer, etc.

In compliance with the superior decree which precedes from his excellency the Capt. Gen. of this province of the 10th of the current month and year, by which as an indemnity he concedes to the firm of Forbes and Co. a tract of land situated between the river Appalachicola on the east and Chata-Hatcha on the west, the sea on the south, on the north by a line which should begin opposite the point of the creek known as Sweet Water Creek, on the east side of the Appalachicola, three *three* miles and a half north of a place known as Alum Bluff, running west to meet the Chata-Hatcha, there following the sinuo*u*sities of this river it empties into the Bay of Sta. Rosa, there following the eastern shore to

the sea, until striking the boundaries of the land already
371 conceded to this firm by the Indians, and follows these boundaries on the west, ascending with the river to where it empties on the west of Appalachicola, and begins at the ext'eme western point of the island of St. Vincent, from there following the boundaries of said land until the Appalachicola, then the tortuous course of said river as far as the *the* division line which serves as boundary on the north front of the above-mentioned creek of Sweet Water. Therefore, in compliance with the already mentioned decree of this excellency of the 10th of the current year, I place in possession of the said firm of Forbes and Co. the above-described tract of land, and I declare and give to them full and complete possession of the aforementioned land, that as their own property they may enjoy it, sell, alien or mortgage it, on any terms they may deem proper.

In testimony of which I ordered to be issued this paper, signed by my hand and sealed with my coat of arms and countersigned by the undersigned secretary of this gov., and subdelegation, the 23rd day of January, 1818.

JOSE MASOT.

CARLOS REGGIO. [SEAL.]

In July, 1819, the same Forbes presented a document with the tenor of which with the interlocutary decrees are as follows:

Your Excellency, Don Juan Forbes, head and manager of the firm of Forbes and Co., merchants of Pensacola, before your excellency, in compliance with the law, appears and states, it is deemed necessary, according to the right the law gives me, that Your Majesty's public surveyor, Don Sebastian Pintado, of that province, who has been sent to the place, make a clear survey of the lands which I own in that territory and which have been granted me as indemnity and damage, recording this in the office of the auditor of the surveys (measures) and which is in the charge of the same Pintado. Therefore I beg your excellency to dispose of the matter in the proper form, first swearing the officer who is to discharge this trust to give oath to its faithful performance, that he date it, and return it to me for my use. This I ask in justice, not in malice or want.

JUAN FORBES. PEDRO RODRIGUEZ SLD.

372 Havana, July 26th, 1819. Ordered to be carried into effect by Dr. Don Francisco Guitart on account of illness of assessor-general.

CIENFUEGOS.

Havana, July 29, 1819. Examined and found correct. Proceed immediately and do as requested in the preceding writing.

CIENFUEGOS. DR. GUITART.

On said 30th day of July was made known to me the last decree for my acceptance and certificate. I accepted the making of the topographical plan of the land, arranging all data of the measurement not by actual measurements, as it was impossible to transport myself to the grounds, fixing it as well as could be with the data I had; also to explain clearly and record the same so that at all times it may be evidence, for

which purpose I ask the documents preceding, which were furnished me from the authenticated document aforementioned as having been examined. I executed it on the 15th day of September of the same year, attaching a graphic description or plan to the said documents. The original I returned as requested and ordered, after having taken the corresponding record. I made the plan or chart under the number 1869 and registered the said number which in regular order belonged to it on the 17th day of the same Sept., specifying the boundaries according to the description at the beginning, estimating the area at the surface at one million and a half arpents, more or less, of land and water.

Havana, 31st October, 1828. VINCENTE SEBASTIAN PINTADO.

This is a copy of the original, which I certify to in compliance with a decree of his excellency, the superintendant gen. delegate of the royal exchequer, its date the 25th of last month, to deliver to the consul of the United States of America, leaving to him to pay the cost of the clerk of his choice, and he is notified to whom it may concern, that in said copy there are written in Arabic numbers the sums and dates, contrary to the uses customary in such documents. And I sign the present in the ever faithful city of Havana on the 15th day of July, 1835.

(Interlineation noted.) Folio 15, who was ignored as not able to
373 appear. Folio 34, for the 40 arpents aforesaid. Folio 69, for the one ordered to send the deed. Folio 71 (X), Spanish. Folio 83 (X), being a native of Louisiana, married and located in Pensacola. Folio 138 (X), for making the survey for said gentleman on the 19th of the same March. Folio 142 (X), this one being dead, they sold his testamentary to Jacob Nash. Folio 143, verbally. Folio 149, on the 26th day of April, 1809. Folio 194, who gave his receipt equally and on the same date. All valid or properly made.

JUAN NEPUOCENO AROCHA.

Well examined and correct.

VILLANUEVA,
Consulate of the United States, Havana.

Received from His Excellency the Count of Villianueva, administrator of the island of Cuba, etc., July 18, 1835. N. P. Trist, consul of the United States and commissioner to demand and receive the Florida archives.

[Seal of the U. S. consulate at Havana.]

(NOTE.—(X) means on the other side of the leaf or folio.)

(The foregoing is indorsed as follows:) "210. 225. L. 1. U. S. District Court, Southern District of Florida. Dalcour vs. U. S. G. Filed in evidence by complainant as Exhibit G, Dec. 28, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk."

374 (I.)

No. 21118.

United States of America, Department of State, to all to whom these presents shall come, greeting:

I certify that the document hereto annexed is a true copy from the records of this Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this 1st day of August, A. D. 1903, and of the Independence of the United States of America the one hundred and twenty-eighth.

JOHN HAY. [SEAL.]

(Copy.)

DEPARTMENT OF STATE, *W., 28 April, 1829.*

JAMES G. RINGGOLD, Esq.,
Attorney U. S. for Middle D. of Fla., Tallahassee.

SIR: I have the honor, by direction of the secretary, to transmit to you by Judge Randal, a manuscript book, lately received here from Mr. Tacon, minister resident from Spain, entitled "Concessiones Terras en Las Floridas," which has been procured from Havana, for the sake of the information which it contains, in reference to some important suits pending in the court of the United States for that district, wherein the United States are parties, and to ask you to let the gentlemen who may be associated with you, in behalf of the United States in these suits, have all the benefit which they can derive from the use and inspection of it.

I am with great respect, sir, your obedient servant,

(Signed) D. BRENT.

(Endorsed:) "210. 225. L. 1. U. S. District Court, Southern District of Florida. Dalcour vs. U. S. I. Filed in evidence by complainant as Exhibit I, Dec. 28, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk."

* * * * * * *

410 EXHIBIT Q.

To the honorable H. M. Brackenridge, one of the United States judges for the Territory of Florida and presiding judge of the Western district of said Territory:

The petition of James Innerarity and of John Innerarity, of the city of Pensacola in said Territory, respectfully represents that they are the sole surviving partners of the late mercantile house of "John Forbes & Co." and are interested as tenants, in common with the heirs of the said John Forbes, in a tract of land lying between the Apalachicola and Choctawhatchie rivers granted by the Spanish Government, while the said Territory of Florida was one of the provinces of Spain, to the said John Forbes and your petitioners under the name and style of "John Forbes & Co.," as will more fully and at large appear by the grant therefor, reference thereunto being had, bearing date the 10th of January, in the year of our Lord 1818, and executed by the then captain-general of the island of Cuba and the two Floridas.

That since the cession of the said Territory of Florida to the United States, the Government of the United States, notwithstanding the stipulations of the treaty of cession in this regard, has refused to recognize the said grant by legislative enactment, but has authorized, by act of

Congress, suit to be brought against the United States to try the validity of the said grant & others similarly situated.

That your petitioners have instituted suit against the United States, in the court of the said United States holden in the county of Escambia, for the purpose of trying the validity of the said grant in pursuance of the said act, and the second day of September next is set for the trial thereof.

411 That your petitioners are advised by counsel that it will be necessary for them to produce at the trial the original grant for the land aforesaid, and that according to the course of that court and the rules of the common law that now govern that Territory a copy thereof can not be read in evidence for them unless they can account satisfactorily for the absence of the original, & then that it is without their fault and beyond their control.

That in consequence of a custom and the uniform practice of the Spanish Government in retaining in the offices appropriated for that purpose the original of all grants, and to allow the grantees to receive copies only of such originals, the original of said grant is not in the possession of your petitioners nor in any manner under their control, but they have been informed and verily believe that Richard K. Call, esq., of the town of Tallahassee, in the county of Leon, has obtained possession of the original of said grant from the Spanish authorities of the island of Cuba, where the same was on record. Wherefore your petitioners pray your honor to be pleased to order the clerk of the U. S. court of Escambia County, wherein the said suit is depending, to issue a writ of subpœna duces tecum directed to the said Richard K. Call, esq., commanding him to be and appear before the said court on the second Monday of September next, and to bring with him the original of said grant in order that the same may be read in evidence on the trial aforesaid & that such proceedings may be had thereupon as pertain to right and justice, & your petitioners will ever pray, &c.

(Sgd.) JAS. INNERARITY.
JOHN INNERARITY.

We do swear that the facts stated in the above petition are true
412 to *to* the best of our knowledge and belief.

(Signed) JAS. INNERARITY.
JOHN INNERARITY.

Sworn to in open court.

(Sgd.) GEO. F. BALTZELL, *Clk.*

Let a subpœna duces tecum issue 2nd August, 1830, according to the prayer of the above petition.

(Signed) H. M. BRACKENRIDGE.

To the CLERK OF THE COUNTY OF ESCAMBIA.

(Marginal:) Filed 3rd August, 1830.

I, A. M. McMillan, clerk of the Circuit Court of Escambia County, Florida, and as such having in my custody the files and records of the United States Superior Court of the Western District of the Territory of Florida, do hereby certify that the foregoing 3 pages constitute a true and correct copy of a paper and its endorsements in the cause of John

Innerarity and James Innerarity and the heirs of John Forbes against the United States, as the same remains of file and of record in said cause in said court.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of March, A. D. 1904.

A. M. McMillan, *Clerk.*

(The foregoing has the following endorsement:) "210. 225. L. 1. U. S. District Court. Southern District of Florida. 'Q' Dalcour vs. U. S. Filed in evidence by complainants and marked 'Exhibit Q.' R. B. Archibald, master. Filed Mar. 17, 1904. E. O. Locke, clerk."

* * * * * * *

420 U.

Territory of Florida,
Escambia County, ss:

I, John Innerarity, one of the petitioners in the case of James Innerarity and John Innerarity and the heirs of John Forbes vs. the United States, do solemnly swear that a chest containing the original exemplifications of the grant to "John Forbes & Co." for a tract of land lying between the Apalachocola & Chactawhatchie rivers, and which had been filed and recorded in the land office established by the United States at Pensacola, has been stolen from the possession of this affiant, and that the said document has never since been recovered, and that I have no knowledge whether the same is now in existence or not, but believe it to have been destroyed, inasmuch as nothing of the contents of said chest have ever been recovered, though several years have elapsed since the loss.

(Signed) John Innerarity.
Before.

Sworn to before me in Pensacola this 29th September, 1830.

M. I. Carnidytier, *T. of W.*

(Endorsement:) Forbes & Co. vs. The U. S. Affidavit.

421 I, A. M. McMillan, clerk of the Circuit Court of Escambia County, Florida, and as such having in my custody the files and *and* records of the United States Superior Court of the Western District of the Territory of Florida, do hereby certify that the foregoing 1 pages constitute a true and correct copy of a paper and its endorsements in the cause of John Innerarity and James Innerarity and the heirs of John Forbes against the United States, as the same remains of file and of record in said cause in said court.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of March, A. D. 1904.

[court seal.] A. M. McMillan, *Clerk.*

(The foregoing has the following endorsement:) "210. 225. L. 1. U. S. District Court, Southern District of Florida. U. Dalcour ve. U. S. Filed in evidence and marked 'Exhibit U.' R. B. Archibald, master. Filed Mar. 17, 1904. E. O. Locke, clerk."

V.

422 Preceding this certificate is a Spanish document the translation of which follows this certificate. Then this certificate as follows:

I, A. M. McMillan, clerk of the Circuit Court of Escambia County, Florida, and as such having in my custody the files and records of the United States Superior Court of the Western District of the Territory of Florida, do hereby certify that the foregoing 14 pages constitute a true and correct copy of a paper and its endorsements in the cause of John Innerarity and James Innerarity and the heirs of John Forbes against the United States, as the same remains of file and of record in said cause in said court.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of March, A. D. 1904.

[SEAL OF COURT.] A. M. McMILLAN, *Clerk.*

Then follows the translation above spoken of as follows:

423 The House of John Forbes & Company.

YOUR EXCELLENCY: Don John Forbes, partner and director of the house of Forbes and Company, established in the place of Panzacola [sic], in virtue of a royal privilege of conducting their trade, and particularly with the Indians of the province, comes before your excellency in the most proper manner and says that during the movements and actions of the last war held between the American Indians and the English subjects of Great Britain, their interests have suffered as well in planting establishments as in their stores, effects, etc., more than any exaggeration could afford an idea of. Many of the slaves belonging to the company were carried away and harboured by the Indians while the Col. Nicholes remained there and although the government of Panzacola, having ascertained the fact complained of the virtual spoliation of the slaves, it was all in vain, for they were not returned.

In order to facilitate their restitution without causing the royal treasury a loss, for which it was and is responsible, my company armed barques on several occasions at their own expense with no other object than to recover them; in the first vessel that went out for that object Government sent with a commission Capt. Don Benigns Calderon, of the regiment of Louisiana, together with other officers; after that on two other occasions private persons in order not to take the public officers from their posts. However, the result of these missions was always not to obtain the restitution of the property carried away. The aforesaid house deputed Edmond Doyle and William Hambly for the aforesaid object, giving them large gratuities for their trouble and compensating the latter for the loss which he suffered of all he possessed. Besides all this, Woodbine instigated the Indians, of whom he had constituted
424 himself chief to steal the negroes and we were compelled to prosecute him, instituting for that purpose a criminal suit which occasioned immense expense without any good result, for he had the art to take occasion to make his escape from the hands of justice in such way that all the efforts and sacrifices made by the house to save the Government

those losses have served only to increase them. In the same time of disorder and confusion the said Indians carried away about 1,000 head of cattle, the property of the company, losing at another place 38 head horses and 2 mules, and at last a troop of the same set fire to the stores of the house at Apalachicola, carrying away with them all of our slaves with all our horses, oxen, and other utensils and goods which they found there, without leaving anything, and carrying as prisoners Doyle and Hambly, who with reason and justice have demanded of the house indemnification for the damage as well as personal injuries which they have experienced in proceedings as strange as unheard of.

So many losses which, including the labor of the negroes, the capital and interest of the money, are not less by a moderate calculation than $100,000.00, are to be indemnified by this Superior Government, to which that of Pensacola is subordinate, either in money or by compensating the company with something else equivalent. The losses are positive, they are actually existing, and it is necessary only to look at the correspondence which took place upon that subject between the commandant of the province and this captaincy-general, to have no doubt of the truth of this my exposition, upon which likewise I can give satisfactory evidence from the surveyor-general, Don Vincente Sebastian Pintado Don Francisco de Arroyo, attached to the secretary of this intendency, and the other individuals of equal respectability who were in Panzacola in the service of his Majesty.

Considering then on the one side how difficult it will be to pay me in actual cash as is my due the $100,000.00 for which most incontestibly my house is creditor on account of the well-known scarcity
125 suffered by the public treasury, and on the other side considering the great services which at all times the house has rendered to the Sovereign, by whose means and help it may be said with truth that the troops of that garrison has been supported, having yet due and to receive more than $8,000, the population of the province would be considerably augmented without comparison of the said sum if full dominion were given to the said house of Forbes which I represent over a tract or parcel of land which is now vacant and begins at the creek known by the name of Sweet Water Creek, emptying into the Apalachicola River, and following a course due west to the Choctawhatchee, following the course of this river to its mouth in the Bay of Santa Rosa's Island, and following thence east on the shore of the said bay and of the sea to the line of the lands west of the Apalachicola, already ceded by the Indians to our house, following the western line of them and ascending the course of the said river to the point of its commencement.

I know very well that the aforesaid land in a great many parts is not susceptible of cultivation, will not compensate for even the one-fourth part of the sum I claim for the losses and damages sustained as I have already herein stated, amount to more than $100,000.00, but as it is to be done this will be to me an additional motive to increase the love and constant loyalty that I and my partners profess to our Sovereign not wishing his Majesty to support the loss of the damages of such a large disbursement and being content that with time and our industry alone it may be made productive of benefit to the said province and tend to the increase of his royal exchequer.

Therefore I supplicate your excellency that having in view what is here recommended what is shown by the correspondence between commandant of Panzacola and this government upon the losses above related and the information which I shall immediately furnish to prove them
426 to be pleased to adjudicate in fee simple (dominio plano) to the firm of Forbes and Company of which I am chief, and which I represent the land or tract of land designated by the boundaries and points already described, taking the provision necessary to giving possession with which we shall consider ourselves satisfied, contented, and compensated for the claims of damages and indemnification asked for. This is justice, and I offer to make oath that it is not through even design and to do anything else that may be necessary, etc. Don Pedro Antonio de Ayala. John Forbes. (Another signature which is illegible.)

Decreto (*Decree:*) Havana, 5th January, 1818. Let this be carried to the Attorney-General [here the title is illegible] to provide what may be necessary.

CIENFUEGOS.
MIGUEL MENDEZ.

Notification. I certify that in the Havana on the same day I communicated this to John Forbes.

MENDEZ.

HAVANA, *5th January, 1818.*

Seen: Let the information which the house of Forbes and Company ask for in the foregoing petition be received by the present escribano, to whom charge be given of it and let him have the necessary assistance to give him the usual political form, and, when completed, let it be brought with the cited papers, the tax of 24 rials paid.

(2)
DEL MONTE.

(1) (3)
CIENFUEGO—MIGUEL MEMDEZ—

I certify that on the same day of the same month and year that I communicated the same to Don John Forbes. Mendez.

HAVANA, *January 7th, 1818.*

Tax of 10 rials paid.

Let this be accomplished without injury to this jurisdiction. A flourish. Ramirez.

COMPUSANO. MIGUEL MENDEZ.

427 Deposition: In the city of Havana, on the 7th of January, 1818, in virtue of the orders received, I went to the house of Don Francisco Gutierres de Arroyo, formerly secretary of the intendency, which used to be in West Florida, and now annexed to the secretary of this superintendency general subdelegate, from whom I received the oath, which he took according to the usual form, to tell the truth, and examined him concerning the tenor of the first sheet of the paper produced by John Forbes. After having well ascertained its meaning, he said: That having resided in that place since February, 1806, discharging the duties of his office he can assure as an ocular witness that the facts on which rest those who ask for an indemnification of damages are so positive and certain that there is no disinterested person in that prov-

ince who would not admit them; that their losses were enormous, as well in the said place as in the factories which they that ask had established on the rivers of Apalachicola and Perdido; that the Indians carried away the slaves they had on their farms, hiding them while the Colonel Nicholes remained there, the demand of the Government not being sufficient to obtain their restitution, nor the commissions which were afterwards given for that object to Captain Benigno Calderon, of the regiment of Louisiana, and other officers, nor to other private individuals, so that in the belief of the deponent the sum of 100,000 dollars asked for the damages related is not exaggerated, comprehending more than a thousand head of cattle, oxen, and horses and other utensils and goods robbed from the house of Forbes by the aforesaid Indians, for which they have not received the smallest compensation from our Government, it being the only house in Panzacola which has rendered important services to our Sovereign; and he says further that what he stated is the truth, under oath, and that he is 55 years old, and that he is not comprised in the generalities of the law, of which he was apprized. This was read to him, and he agreed to its contents and signed it; all of which I certify.

FRANCO. GUTIERREZ DE ARROYO.

Before me,

MIGUEL MENDEZ.

428 In the city of Havana, on the same day, month, and year, I went to the house of Don Vincente Sebanstian Pintado, surveyor-general for his Majesty, from whom I received the oath which he took in the usual form to tell the truth, and having examined him as I did the preceeding witness, he said: That having remained in Panzacola he knows and is certain that during the movements and actions between the American Indians and the English subjects of Great Britain the house of Forbes and Company, established there by royal permission to treat with the Indians, suffered damages to the greatest amount as well in Panzacola as in Perdido and in Apalachicola by the events and causes which they had narrated, and that although the deponent can not estimate to how much their damage and injuries did amount, still he believes it to be a considerable sum, and likewise that they have at all times rendered important service to the troop of that garrison and to the King, our Lord, upon which subject there must exist evidence in the secretary of this Government. And he answers that all he has stated is the truth, under oath, his being of age, and not comprised in the general provisions of the law of which he was apprized.

It was read to him, and he assented to it and signed the same, which I certify.

VINCENTE SEBASTIAN PINTADO.

Before me,

MIGUEL MENDEZ.

429 In the City of Havana in the day, month, and year aforesaid, I went to the house of Don Francisco Guerrero, captain of the regiment of Louisiana, from whom I received the oath in the usual form, which he took, of telling the truth, and being examined as the

preceeding witnesses, he said: That having resided for a long time in Panzacola that he knows and is certain that during the movements and actions between the American Indians and the English subjects of Great Britain the house of Forbes and Company established by royal permission for the trade with the Indian tribes suffered damages to the greatest amount; that during the residence of the Colonel Nicholes the said Indians did carry away and secrete a good many of their negro slaves, this taking place when Naubine became their chief and compelled them to steal negroes and commit other crimes and misdeeds; that they carried away the number of cattle, oxen, and horses designated, reducing to ruin the factories which they had established on the rivers of Apalachicola and Perdido, and although Government made several demands for the restitution of the large amount of goods taken from Forbes and Company nothing was obtained, the firm being entitled to claim them from the Sovereign; that there is no doubt they may amount to the sum of 100,000 asked by them by an aproximate calculation. Likewise that there is no doubt of the important services which they have rendered at all time to the troop of that garrison, and to the King, our Lord, of which there must exist evidence in the secretary of this Government. And he further states that all that he says is the truth under oath; that he is of age; that he does not come under the general provisions of the law of which he is apprized.

And all of this was read to him, to which he assented and signed; to which I certify.

FRANCISCO GUERRERO.

Before me,

MIGUEL MENDEZ.

430 In the city of Habana, on the same day of the month and year aforesaid, in virtue of the orders received, I went to the house of Don Franco Moralez, captain of the regiment of Louisiana, of whom I received the oath, which he took in the usual form, to tell the truth, and, having examined him after the manner as the preceding witnesses, he said: That having resided a long time in the place of Panzacola, and particularly during the movements and actions between the American Indians and the English subjects of Great Britain, he knows and he is certain that the house of Forbes and Company, established there by royal permission to trade with the Indian tribes, has suffered the injuries which are stated in the writing of the first, for it is evident that during the residence of Colonel Nicholes the said Indians did carry away and kill many negro's, their slaves, this happening while Naubian [Nauvine] made himself their chief, and compelled them to steal the negro's and to commit divers other crimes and misdeeds. That they carried away the number of cattle, oxen, and horses designated, reducing to ruin the factories which they had established on the rivers of Apalachicola and Perdido, and although that government made many demands for the restitution of the large amount of goods taken from Forbes and Company nothing was obtained, the firm being entitled to claim them from the Sovereign. That there is no doubt but that they may amount to the sum of $100,000 asked by them by an approximative calculation.

Likewise that there is no doubt of the important services which they that ask have at all times rendered to the troop of that garrison, and to

the King our Lord, of which there must exist evidence in the secretary of this government. And he further says that all that *that* he has here said is the truth under oath, and that he is of age, and that he does not come within the general provisions of the law, of which he is apprized. It was read to him, to which assented and signed it, of which I certify.

FRANCO DE PAULA MORALEZ.

Before me,

MIGUEL MENDEZ.

431 HAVANA, *January 10th, 1818.*

Seen: Together with the foregoing papers, which were ordered to be sent to the consulta by a provision of the 6th of the present month considering the merits and who produces this record (expediente), in which the house of Forbes & Company, established by royal permission in the plaza of Panzacola to trade with the Indian tribe, claims an indemnification of 100,000 dollars for effective losses from damages and injuries sustained during the movements and actions between the said American Indians and *and* the English subjects of Great Britain whilst Colonel Nicholes remained there and Naudbine rendered himself chief of them, instigating them to commit every sort of robbery, for which, at that time, the due demands were made without obtaining any restitution to the house of Forbes for the negro's and other animals and goods of which they were unjustly deprived, and considering on the other hand that the tract of land that they ask to be adjudicated them in payment or compensation for the said sum never can amount to this sum in a very thinly settled province in which lands remain uncultivated for want of persons to attend to their culture, according to the information which has been taken, and particularly that of the surveyor-general of His Majesty, Don Vincente Sebastian Pintardo, and that Don John Forbes, chief and principal partner of that house, by taking possession of it will be able to benefit the province and bring colonists to establish themselves in it, rendering fruitful for the benefit of the State what now is desert and sterile, which considerations have moved the worthy soul of His Majesty, in his royal cedula of the 10th of August, 1815, to offer lands to those who would choose to settle in the island of Porto Rico as the best means to be employed for the increase of the settlement. His excellency immediately said that, using the power belonging to him, he applied and had applied the said land to John Forbes and Company, agreeable to the boundaries and points designated in the writing of the first sheet remaining, by the same deprived of all rights to claim from the royal exchequer the losses and injuries which they may have experienced, for by its value, whatever it may be, they remain compensated for all, and the claim of indemnification which they had established stand cancelled, and let
432 the commandant of the said place of Panzacola, in virtue of this resolution, put him in quiet and peaceable possession of the aforesaid land, for which object his excellency (this word uncertain from a blot) ordering that the necessary evidence be given to the house of Forbes, the original being filed in the archives.

Tax 32 rials, paid.

DEL MONTE.

CIENFUEGOS.
MIGUEL MENDEZ.

I hereby certify that on the same day I communicated all this to Don John Forbes.

MENDEZ.

YOUR EXCELLENCY: The house of Forbes and Company, merchants, in Pensacola, through their attorney in this city say to your excellency that in the midst of the disturbances and confusion caused in the public archives at that place by the entrance and possession which the American arms took of it, he has kept the original act or dispatch which Don Joseph Masot, civil and military commandant of the province of Florida, did dispatch in consequence of the one sent to him by this Superior Government upon the indemnification of damages claimed by the petitioners and wishing to receive two authenticated copies (testimonies) one to annex to the record (expediente) which exists in Pensacola and the other to keep, and therefore he supplicates your excellency to order the escribano of Government to furnish him with the two copies he asks, for which he implores as a favor.

COLIN MITCHELL.

Habana, December 17th, 1818.
(In the margin of the above is written:)
Let this be shown to the assessor-general. CIENFUEGOS.

433 HAVANA, *December 18th, 1818.*

Seen: The aforesaid document which has been presented. Let the house of Forbes and Company be furnished with the copies (testimonials) requested.
Tax, 16 rials, paid.

CIENFUEGOS.
DEL MONTE. MIGUEL MENDEZ.

I certify that on the same day of the month and year aforesaid I communicated this to Don Colin Mitchell.

MENDEZ.

434 D. Jose Massot, colonel of the Royal Corps of Artillery, civil and military commandant of the province of West Florida, subdelegate of the exchequer therein, &c., for all and in compliance with the superior decree which preceeds of his excellency the captain-general of this province, of the tenth of the present month and year, whereby, as indemnification, he grants to the house of Forbes & Co., a tract of land situated beween the river Apalachicola, towards the E., the Chocta-hache towards the W., the sea to the S. and towards the N. by a line that should commence opposite the creek known by the name of Aguadulce or Sweet Water Creek, situated on the E. part of the Apalachicola, about 3 1 2 miles north of the place with the name of Allum Bluff, and is to run W. until it meets the Choctahache and from there follow the course of this river until it empties itself in St. Rosa Bay, from there following the E. shore of this until the sea, its high tide making its S. boundary, till meeting those of the lands that the said house already has, W. of the Apalachicola, and begins opposite the point, also W. of the island of St. Vincente, from there following the boundaries of said lands until the Apalachicola, then the course of said river till meeting the starting point,

that serves as its N. boundary, opposite to the already named Arroyo de Aguadulce. Therefore, and in compliance with the already named decree of his excellency of the tenth of the current year, I put the said house of Forbes and Company in possession of the tract of land described, and in consequence I declare and impart full and direct dominion to the said house, of the said land, that as their property they may enjoy it, possess, sell, or transfer on the terms that may best suit them, in faith of which I order the present given, sign of my hand, sealed with my arms, and countersigned by the undersigned secretary of this government and subdelegation, the 23rd day of January, 1818.

JOSE MASSOT. CARLOS REGGIO. [L. S].

It is in conformity with its original that I returned to the party to which it refers, and in virtue whereof, I order the present given.

Habana, December 19th, year of 1818.

(Signed) MIGUEL MENDEZ.

435 LEGALIZACN.

The notaries public of the King our Lord and of his Royal College in this city, who here sign and rubricate, certify and give faith that Dn. Miguel Mendez, by whom also appears authorized the preceding testimony, is also a notary public of His Majesty, deputy of the mayor of government and the council, faithful, loyal, and trustworthy, makes use of and exercises with approval, and to such as him full faith and trust has always been given in both courts. Habana, December nineteenth, one thousand eight hundred and eighteen. (Signed) Juan de Dios Corona. (Signed) Jose Manuel Navarro. (Signed) Jose Nuno de Cueto. [L. S.]

It is in conformity with its originals that, in order to give this copy, were presented to me by Dn. Colin Mitchell, to whom I returned them, whom I now address, and upon whose request I now give the present. Habana, 23rd of June, one thousand eight hundred and twenty-four.

(Signed) Gabl. Ramirez.

436 The notaries public of the King our Lord and of the Royal College of this city, who here sign and rubricate, certify and give faith that Dn. Gabriel Ramirez, by whom the preceding testimony is authorized, is a notary public of the number of this city, faithful, loyal, and trustworthy, makes use of and exercises his functions with general approval. And that it may appear we give the present sealed with the seal of our Royal College. Haba., date, ut supra. Three signed. (Signed) Jose Leal. Manuel de la Torre. Jose Lorenzo Rodriquez.

[ARMS]

Don Francisco Dionisio Vives, Grand Cross of the Royal and Distinguished Spanish Order of Charles 3rd and of the Royal American Order of Elizabeth and the Catholic and of the Military of San Hermenegildo, third order Knight of the Royal of San Fernando, several times declared Father of the Country, condecorated with the Arms of fidelity, the Star of the North, and for other nine deeds of war, Lieutenant-General of the Royal Armies, Governor of the City and Province of Habana, Captain-General of the Island of Cuba, President of the Royal Audience at the

city of Puerto Principe in the same Island and of the Provincial Assembly of the Royal American Order of Elizabeth the Catholic, Juez de Alzados of the Tribunal of the Royal Consulate and President of the Financial Council Government of same, Subdelegate of the Superintendency General of the Post-Office and Express and of the Royal Company of Habana, &c., &c., &c.

I certify that the signatures that give validity of the enclosed testimony of Dn. Gabriel Ramirez, Dn. Jose Leal, Dn. Manuel de la Torre and Dn. Jose Lorenzo Rodriguez are of the hand of the same and such as are called notaries public, and of the number of this city, to whom full faith and confidence is due, in or out of judgment. And that it may appear, I give the present at Habana, the eleventh of February, eighteen hundred and twenty-nine. (Signed) Frco. Diono. Vives.

E. [ARMS].

437 ST. AUGUSTINE, FLORIDA, *March 4th, 1904.*

I, Annie Averette, do hereby certify that I have lived in the island of Cuba many years and am familiar with the Spanish language and the English language, and versed in the translation from the Spanish into English; that I have carefully gone over the papers heretofore first attached in Spanish, and made a translation thereof, which is hereto second attached, and that the said translation is true, correct, and complete, according to the best of my skill, knowledge, and belief.

ANNIE AVERETTE.

Sworn to and subscribed before me this March 7", 1904.

W. WALLACE SNOW,
Notary Public.

My commission expires Nov. 12", 1905.

(The foregoing is endorsed as follows:) "210. P. 225. L. 1. U. S. District Court Southern District of Florida. V. Dalcour vs. U. S. Filed in evidence and marked "Exhibit V." R. B. Archibald, master. Filed Mar. 17, 1904. E. O. Locke, clerk."

438 EXHIBIT W.

(Preceding the *the* following is a document of 5 pages in Spanish, omitted by consent of counsel, and the following, which is a translation, is by consent of counsel substituted therefor, after the following certificates, viz:)

I, Joseph E. Caro, keeper of the public archives of West Florida, duly qualified and commissioned by the President of the United States of America, do hereby certify the foregoing five pages to contain a true and complete transcript from the original proceedings instituted by John Innerarity now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office, in the city of Pensacola, this 15th September, in the year of our Lord 1830.

[OFFICIAL SEAL.] JOSEPH E. CARO,
Keeper of the Public Archives.

I, A. M. McMillan, clerk of the Circuit Court of Escambia County, Florida, and as such having in my custody the files and records of the United States Superior Court of the Western District of the Territory of Florida, do hereby certify that the foregoing 4 pages constitute a true and correct copy of a paper and its endorsements in the case of John Innerarity and James Innerarity and the heirs of John Forbes against the United States, as the same remains of file and of record in said cause in said court.

In witness whereof I have hereunto set my hand and affixed my official seal this 2nd day of March, A. D. 1904.

A. M. McMillan, *Clerk.*

(Then follows said translations, i. e:)

439 F. PETITION.

Señor Governor: Dn. Juan Innerarity, partner in the house Dn. Juan Forbes & Co., with the due respect, before your excellency appears and says: That two or three Anglo-American vagabonds, with neither its permission or consent, nor of any of its members, have settled in the lands they own between the rivers Apalachicola and Chocta Hache, on the eastern shore of the last; and, anyhow, as if the deponent should omit mentioning it, it could perhaps be considered in the future as a tacit consent on his part, and on the strength thereof these intruders obtain or pretend right over the lands they may have cultivated or settled; anxious to avoid this extreme, keeping free and unquestionable entirely, and in any time, the exclusive right that his house has to the whole of these lands, of your excellency begs to deign, supporting him in this property, issue to the effect, your superior decree, so that without excuse and immediately, these intruders remove themselves and leave the locations they may have settled or cultivated; which is favor and justice that he hopes to receive of the upright that your señoria exercises.

I swear not to proceed from malice and in the necessary, &c.

Juan Innerarity.

Panzacola, 27th of March, 1819.

(Decree:)

As this party requests; making the persons who are settled in the territory of his property, without his consent, understand to vacate immediately; and if they should have something to say in their favor, to appear before this tribunal, where they will be heard in justice.

Callava.

440 ANOTHER PETITION.

Dn. Juan Innerarity, in the name of the house of Dn. Juan Forbes & Co., which he represents, in the best form of right, before your lordship deposes: That having, under date of the 27th of last March, fallen back to the request presented a decree of your lordship that the intruders that were settled without the permission of this Government nor ours on the tract of lands of our property, from the river Chocta Hache and to the Apalachicola, should vacate them immediately and the already known parties not having obeyed nor complied with the intimations made to them, of your lordship sincerely begs to deign to issue a decree, confirma-

tory of the first, and that it may have the proper efficacy entrust its execution to a person who may be of the liking of the tribunal, avoiding in this way the damages that would result from our inaction; and that it may in all times appear that I be provided with the necessary testimonies of the steps taken towards attaining what I solicit; that being to do justice. I swear in the necessary, &c.

JUAN INNERARITY.

Panzacola, 30th of September, 1819.

(Decree:)
Let testimony of the deeds of ownership that this party has over the lands to which the request refers be put in continuation and it will be furnished. Callava. Juarez. Domo Sausa. Jose Caro.

(Notif'n:)
On the same day we made it known to Dn. Juan Innerarity, of which we give faith. Sausa. Caro.

441 (Another decree:)
Panzacola, 7th of October, 1819. Seen: And in consideration of the lately represented by Dn. Juan Innerarity, let, with the due formality, the corresponding order be issued that all and any parties that may have occupied or stationed themselves on lands of these belonging to Dn. Juan Forbes & Co., as is assured by the titles of property that have been had at sight, leave them immediately, not having settled thereon by special agreement made with the said Messrs. Forbes & Co.; informed that upon not doing it in the peremptory term of ten day after making this order known, proceedings shall be made in what may be proper by right; its execution being entrusted to Dn. Jonathan Bunker or to the person who may be worthy of trust of the member who represents in the name of the expressed house, to whom will be delivered, for the better execution of the repeated order, the testimony of the titles of ownership that this party has exhibited, which will be unfilled for this purpose, so being noted in these proceedings, by the assistant witnesses. Callava. Juarez. Domingo Sausa. Joseph Caro.

(Notif'n:)
On the same day we made it known to Dn. Juan Innerarity, of which we give faith. Sausa. Caro.

NOTE.—That under date of this day, order was given to the persons therein named, and that all may appear, we put it as procedure, of which we give fair.

DOMINGO SAUSA. JOSEPH CARO.

442 Appraisement of costs caused in these proceedings as per the tariff:

To the Sr. Governor, fees	8 reales.
To the Sr. Auditor of War, idem	24 ras.
To the assistant witnesses	16 ras.
Make $6.00	48 ras.

Panzla. 13th of October, 1819.

DOMINGO SAUSA.

PENSACOLA, *Florida, March 1, 1904.*

I, I. J. Diaz, do hereby certify that I am a native of the Republic of Mexico, and familiar with the Spanish language and the English language, and versed in the translation from the Spanish into English; that I have carefully gone over the paper heretofore first attached in Spanish, and made a translation thereof, which is hereto second attached, and that the said translation is true, correct, and complete according to the best of my skill, knowledge, and belief.

I. J. DIAZ.

Sworn to and subscribed before me this March 1, 1904.

F. C. LE BARRON, *Notary Public.*

My commission expires Oct. 27, '07.
[NOTARIAL SEAL.]

(The foregoing is endorsed as follows:) "210, 225. L. 1. U. S. District Court, Southern District of Florida. W. Dalcour et al. vs. U. S. Filed in evidence & marked 'Exhibit W.' R. B. Archibald, master. Filed Mar. 17, 1904. E. O. Locke, clerk."

443 EXHIBIT X.

Dn. José Callava, caballero de la Real y Militar Orden de S. Hermenegildo, condecorado con la cruz distincion de la Batalla de Almonacid, Teniente Coronel de los Rs. Extos., Comandte. Político y Militar de la Provincia de la Florida Occidental y Subdelegado de real hacienda en ella, &ª.

Por quanto á lo nuevamente representado por Dn. Juan Innerarity, mando y ordeno á todos y a qualesquierá individuo que hayan ocupado ó se hallan establecidos en los terrenos pertenecientes á Dn. Juan Forbes y Compa., situados entre los ríos de Apalachicola y Chactahache, no siendólo por convenio particular celebrado con los referidos Sres. Forbes y Compa., lo desocupen precisamte, en el perentorio término de diez días después de notificada esta orden y de no verificarlo en el expresado término se procederá a lo que hubiere lugar por derecho, cometiendo la notificacion y execucion de esta á Dn. Johathan Bunker, y para la major inteligencia se traducirá en idioma inglesa por Dn. José Ignacio Cruzat, cuya traducion extendrá y firmará á continuacion de esta mi mandamiento.

Dado en Panzacola, firmado de mi mano, sellado con el sello de mis armas y refrendado por el infrascripto secretario de esta Gobno. á ocho de octubre de mil ochocientos diez y nueve.

JOSÉ CALLAVA,
CARLOS REGGIE.

Dn. Joseph Callava, Knight of the Royal & Military Order of St. Hermenegildo, condecorated with the cross of distinction of the Battle of Almonacid, Lieut. Colonel of the Royal Armies, Civil & Military Governor of the Province of West Florida, and subdelegate of the Department of Finance, &c., &c.

In consequence of the renewed application of John Innerarity, esqr., I order and command all and singular, person or persons, who may have occupied or established themselves in the lands of territory belonging to

Mess. John Forbes & Company, situated and bounding by and between the rivers Chacta Hache and Apalachicola, unless by special permission of or agreement entered into with the said John Forbes & Com-
444 pany that they shall definitely remove from the same within the peremptory term of ten days after the notification of this order, and in case of noncompliance within the time specified, they will be proceeded against according to law. The notification and execution of this order is entrusted to Mr. Jonathan Bunker, and for the better comprehension thereof it is to be translated into English by Don Jose Ignacio Cruzat, which translation he is to extend and sign in continuation of this my order.

Given at Panzacola, signed with my hand, and sealed with the shield of my arms, and countersigned by the undersigned secretary of this Government this eighth day of October, one thousand eight hundred and nineteen.

(Signed) JOSE CALLAVA.
(Countersigned) CARLOS REGGIE.

I, Dn. Jose Ignacio Cruzat, sublieutenant of the regiment of Louisiana and annexed to the secretary's office of this Government, specially charged with the translation of official documents thereof, in virtue of the preceding order, do hereby certify and declare that the foregoing is a just, true, and faithful translation of same. In witness whereof I hereunto affix my signature in Pensacola, day and date aforesaid.

By his excellency's command.

(Signed) JOSE IGO. CRUZAT.

Dn. José Callava, caballero de la Real I Militar Orden de S. Hermenegildo, condecorado con la Cruz de destincion de la Batalla de
445 Almonacid, Teniente Coronel de los Reales Extos., Comandante Politico y Militar de la Provincia de la Florida. Occidental y Subdelegado de Real Hacienda en ella, &c., &c.

Certifico, que la copia que antecede es conforme a un original, y para que asi conste, doy la presente en Barrancas, firmado de mi mano, sellado con el Sello de mis armas, referendado por el infranscripto Secretario de este Gobierno a veinte y dos de Octubre de mil och cientos dies y nueve.

[SEAL.] JOSE CALLAVA.
CARLOS REGGIE.

I, A. M. McMillan, clerk of the Circuit Court of Escambia County, Florida, and as such having in my custody the files and records of the United States Superior Court of the Western District of the Territory of Florida, do hereby certify that the foregoing 3 pages constitute a true and correct copy of a paper and its endorsements in the cause of John Innerarity and James Innerarity and the heirs of John Forbes against the United States, as the same remains of file and of record in said cause in said court.

In witness whereof I have hereunto set my hand and affixed my official seal this 2 day of March, A. D. 1904.

A. M. MCMILLAN, *Clerk.*

Dn. Jose Callava, Knight of the Royal and Military Order of St. Hermenegildo, condecorated with the cross of distinction of the battle of Almonacid, lieutenant-colonel of the royal armies, civil and military commandant of the province of West Florida, and subdelegate of the department of finance therein, &c., &c.

Certify, that the foregoing copy is in conformity with an original, and that it may so appear I execute the present at Barrancas, signed with my hand, sealed with the seal of my arms, and countersigned by the undersigned secretary of this government, the twenty-second of October, one thousand eight hundred and nineteen.

[SEAL.] JOSE CALLAVA.
CARLOS REGGIO.

446 PENSACOLA, FLORIDA, *March 1, 1904.*

I, I. J. Diaz, do hereby certify that I am a native of the Republic of Mexico, and familiar with the Spanish language and the English language, and versed in the translation from the Spanish into English; that I have carefully gone over the paper heretofore first attached in Spanish, and made a translation thereof, which is hereto second attached, and that the said translation is true, correct, and complete, according to the best of my skill, knowledge, and belief.

I. J. DIAZ.

Sworn to and subscribed before me this March 1, 1904.

[NOTARIAL SEAL.] F. C. LE BARRON,
Notary Public.

My commission expires Oct. 2nd, '07.

(The foregoing is endorsed as follows:) "210. 225. L. 1. U. S. District Court Southern District of Florida. X. Dalcour vs. U. S. Filed in evidence and marked 'Exhibit X.' R. B. Archibald, master. Filed Mar. 17, 1904. E. O. Locke, clerk."

447 EXHIBIT 1.

Extracts from journal of the Superior Court for the District of West Florida.

FRIDAY, *December 11th, 1829.*
(Page 470.)

Present, Hon. H. M. Brackenridge, judge.

JOHN INNERARITY FOR JOHN FORBES & CO.
vs.
THE UNITED STATES.

And now at this day comes the said petitioner by his counsel, and on motion it is ordered that he have leave to amend his petition heretofore filed herein.

MAY 12th, 1830.
(Page 491.)

Present, the Honorable Henry M. Brackenridge, judge.

JOHN FORBES & Co. } On petition.
vs.
THE UNITED STATES. }

This cause being set down and now called for hearing, the petitioners having announced themselves ready for trial, the United States, by their attorney, moved that the same be continued. Whereupon, and on debate of the matter, and it appearing to the satisfaction of the court from the cause shown by the United States that the same ought to be continued, it is therefore considered by the court now here that the same be continued at the instance of the said United States until the second Monday of September next.

448

AUGUST 30, 1830.
(Page 493.)

Present, Honorable Henry M. Brackenridge, judge.

JOHN FORBES & Co. } On petition.
vs.
THE UNITED STATES. }

This day came the *the* parties, by their solicitors, and the complainants on affidavit presented and filed are granted a subpœna duces tecum against Richard K. Call, esq., of the city of Tallahassee, Leon County, Florida, returnable the second Monday of September next.

JOHN FORBES & Co. } On petition.
vs.
THE UNITED STATES. }

On motion of the solicitors for the petitioners it is ordered that the clerk of the United States Court for the county of Leon furnish this court with a copy of the list of grants of lands made by the late Government of Spain in the two Floridas, which said list, it is alleged, has been furnished by the court of Spain to the Government of the United States, and is filed in the office of said court among the exhibits of a cause therein depending, in order that the same may be used for such purposes as the court shall judge proper on the trial of said above-entitled cause.

* * * * * * *

MONDAY, *September 20th, 1830.*
(Page 497.)

Present, Honble. Henry M. Brackenridge, judge.

JOHN AND JAMES INNERARITY AND THE heirs of John Forbes, deceased, } On petition.
vs.
THE UNITED STATES. }

449 This day came the parties by their counsel and the petitioners by their counsel, filed a copy of a letter from the captain-general

of the island of Cuba to R. K. Call, esquire, and a copy of a list of grants furnished to the United States by the King of Spain, and the argument of the cause commenced on the part of the claimants.

JOHN & JAMES INNERARITY AND THE heirs of John Forbes, deceased, *vs.* THE UNITED STATES. } On petition.

This day came the parties by their counsel, and by consent the petitioners filed a certificate of the commission of Don Jose Cienfuegos as captain-general of the island of Cuba, and the argument of this cause was continued on the part of the claimants.

SEPTEMBER 23, 1830.
(Page 498.)

Present, Honbl. Henry M. Brackenridge, judge.

JOHN & JAMES INNERARITY AND THE heirs of John Forbes, deceased, *vs.* THE UNITED STATES. } On petition.

The argument of this cause was resumed by the counsel on the part of the United States and continued until it was
Ordered, that court adjourn until to-morrow morning, nine o'clock.

SEPTEMBER 25TH, 1830.

Present, Honbl. Henry M. Brackenridge, judge.

JOHN & JAMES INNERARITY AND THE heirs of John Forbes, deceased, *vs.* THE UNITED STATES. } On petition.

450 The argument of this case was resumed by the counsel on the part of the United States and concluded.

WEDNESDAY, *September 29th, 1830.*
(Page 499.)

Present, the Honbl. Henry M. Brackenridge, judge.

JOHN & JAMES INNERARITY AND THE heirs of John Forbes, deceased, *vs.* THE UNITED STATES. } On petition.

This day came the parties by their counsel, and the parties being fully heard both on the part of the petitioners and of the United States in argument, but the court not being sufficiently advised herein, took time, &c.

THURSDAY, *September 30th, 1830.*

Present, the Honbl. Henry M. Brackenridge, judge.

JOHN & JAMES INNERARITY AND THE HEIRS of John Forbes, deceased, petitioners,
vs.
THE UNITED STATES, RESPT. } On petition.

On motion of the counsel for the United States, it is ordered that either party be allowed to file on or before the first day of the next term with the clerk such supplementary documentary evidence, or such affidavits accounting for their nonproduction, as they may deem proper, subject to the legal objections of either party to the receiving the same in evidence. The petitioners presented the affidavit of John Innerarity, which is filed accordingly.

451 (Page 500)

JOHN & JAMES INNERARITY AND THE HEIRS of John Forbes, deceased, petitioners,
vs.
THE UNITED STATES, RESPT. } On petition.

This day came John de la Rua, witness on the part of the defendants, into open court, and requests that so much of his deposition taken before the commissioners in the city of Pensacola on the eleventh day of September and filed in this case as relates to the signature of Governor Zuniga, be surpressed, having originated in mistake, which is accordingly done.

This is endorsed: "U. S. District Court, Southern District of Florida. No. 1. Filed in evidence by defendant, and marked 'Exhibit No. 1,' Dec. 30, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk."

* * * * * * *

454 EXHIBIT 3.

The house of John Forbes & Company.

YOUR EXCELLENCY: Don John Forbes, partner and director of the house of Forbes & Company, established in the place of Pensacola, in virtue of a royal privilege for conducting their trade and particularly with the Indians of this province, comes before your excellency in the most proper manner and says: That during the last war held between the American Indians and the English subjects of Great Britain their interests have suffered, as well in planting establishments as in their stores, effects, &c., more than any exaggeration could afford an idea of. Many of the slaves belonging to the company were carried away and harboured by the Indians while the Col. Nicholas remained there, and although the government of Pensacola having ascertained the fact com-

plained of the violent spoliations of the slaves it was all in vain, for they were not returned.

In order to facilitate their restitution, without causing to the royal treasury a loss for which it was and is responsible, my company armed barques on several occasions at their own expense, with no other object than to recover them. In the first vessel that went out for that object, Government sent with a commission Captain Don Benigno Calderon, of the regiment of Louisiana, together with other officers; after that on two other occasions private persons, in order not to take the public officers from their posts. However, the results of these missions was always not to obtain the restitution of the property carried away. The aforesaid house deputed Edmund Doyle and William Hambly for the aforesaid object, giving them large gratuities for their trouble, and compensating the latter for the loss which he suffered of all he possessed.

Besides all this, Woodbine instigated the Indians, of whom he had constituted himself a chief, to steal negroes, and we were compelled to prosecute him, instituting for that purpose a criminal suit which occasioned immense expenses without any good result, for he had the art to take occasion to make his escape from the hands of justice in such way that all the efforts and sacrifices made by the house to save to Government these losses have served only to increase them. In the same time
455 of disorder and confusion the said Indians carried away about one thousand head of cattle, the property of the company; losing at another place thirty-eight horses and two mules, and at last a troop of the same set fire to the stores of the house at Apalachicola, carrying away with them eleven of our slaves, with all our horses, oxen, and other utensils and goods which they found there, without leaving anything, and carrying as prisoners Doyle and Hambly, who with reason and justice had demanded of the house indemnification for the damages as well as personal injuries which they have experienced in proceedings as strange as unheard of.

So many losses, which included the labors of the negroes, the capital and interest of the money, are not less by a moderate calculation than one hundred thousand dollars, are to be indemnified by this Superior Government to which that of Pensacola is subordinate, either in money or by compensating the company with someting else equivalent. The losses are positive, they are actually existing, and it is necessary only to look at the correspondence which took place upon that subject between the commandant of the province and this captain-generalcy to have no doubt of the truth of this my exposition, upon which likewise I can give satisfactory evidences from the surveyor-general, Don Vicente Sebastian Pintado, Don Francisco de Arroyo attached to the secretary of this intendency, and other individuals of equal respectability who were in Pensacola in the service of His Majesty.

Considering then on the one side how difficult it will be to pay me in actual cash, as is my due, the one hundred thousand dollars for which most incontestibly my house is creditor on account of the well-known scarcity of money sufferred by the public treasury, and on the other side considering the great services which at all times the house has rendered to the sovereign by whose means and help it may be said with truth that troops of that garrison have been supported, having yet due and to

receive more than eight thousand dollars, the population of the province would be considerably augumented without comparison of the said sum if full dominion were given to the said house of Forbes which I represent over a tract or parcel of land which is now vacant and begins at the creek known by the name of "Sweetwater Creek," empting into
456 the Appalachicola River and following a course due west to the Choctawhatchie, following the course of this river to its mouth in the Bay of Santa Rosa's Island, and following thence east on the shore of the said bay and of the sea to the line of the lands west of the Appalachicola already ceded by the Indians to our house, always following the western line of them and ascending the course of the said river to the point of its commencement.

I know very well that the aforesaid land, which in a great many parts is not susceptible of cultivation, will not compensate for even one-fourth part of the sum I claim, for the losses and damages sustained, as I have already herein stated, amount to more than one hundred thousand dollars. But what is to be done? This will be to me an additional motive to increase the love and constant loyalty that not only I but by partners profess to our sovereign, not wishing His Majesty to support the loss of the damages of such a large disbursement, and being content that with time and our industry alone it may be made productive of benefit to the said province and tend to the increase of his royal exchequer.

Wherefore I supplicate Your Excellency that, having in view what is here recommended, what is shown by the correspondence between the commanderio of Pensacola and this Government upon the losses above related and the information which I shall immediately furnish to prove them, to be pleased to adjudicate in fee simple (dominio pleno) to the firm of Forbes & Company, of which I am chief and which I represent, the land or tract of land designated by the boundaries and points already described, taking the provision necessary to giving us possession, with which we shall consider ourselves satisfied, contented, and compensated for the claim of damages and indemnifications asked for. This is justice, and I offer to make oath that it is not through evil design and to do anything else that may be necessary, &c.

JOHN FORBES.

PEDRO A[illegible] DE AYALA.

Havana, 5th of January. Let this be carried to the as'es'or-general to provide what may be necessary.

(Signed) CIENFUEGO,
MIGUEL MENDEZ.

I certify that in the Havana on the same day I communicated this to Don John Forbes.

MENDEZ.

457 Havana, 5th of January, 1818. Seen. Let the information which the house of Forbes and Company asks for in the foregoing petition be received by the present escribiano, to whom charge is given of it, and let him have the necessary assistance to give him the usual political form, and when completed let it be brought with the cited papers. The tax of 24 rials paid.

DEL MONTE. CIENFUEGO. MIGUEL MENDEZ.

I certify that on the same day of the same month and year that I communicated the same to Don John Forbes.

Tax of 10 rials paid. MENDEZ.

February 14,
Havana, January 7th, 1818.

Let this be accomplished without injury to this jurisdiction. A flourish.

RAMIREZ. CAMPUSANO. MIGUEL MENDEZ.

In the city of Havana, on the 14th of February, 1818, in virtue of 7th of January,
the orders received, I went to the house of Don Francisco Gutierrez de Arroyo, formerly secretary of the intendency which used to be in West Florida and now annexed to the secretary of this superintendency general subdelegated, from whom I received the oath, which he took according to the usual form to tell the truth, and examined him concerning the John Forbes
tenor of the first sheet of the paper produced by Don (Colin Mitchell as attorney of the house of Forbes and Company, merchants, of Pensacola). After having well ascertained its meaning, he said: That having resided in that place since February, 1806, discharging the duties of his office, he can assure, as an ocular witness, that the facts on which rest those who ask for an indemnification of damages are so positive and certain that there is no disinterested person in that province who would not admit them; that their losses were enormous as well in the said place as in the factories which they had established in the rivers of Appalachicola and Perdido, that the Indians carried away the slaves they had on their farms, hiding them while the Colonel Nichols remained there, the demand of Government not being sufficient to obtain their restitution nor the commissions which were afterwards given for that object to Captain Benigno Calderon and other of his officers and to other private individuals,
so that in the belief of this present deponent the sum of one hundred
458 thousand dollars asked for the damages related is not exaggerated,
comprehending more than a thousand head of cattle, oxen, and horses, and other utensils and goods robbed from the house of Forbes by the aforesaid Indians, for which they have not received the smallest compensation from our Government, it being the only house in Pensacola which has rendered important services to our sovereign.

And he says further that what he stated is the truth under oath, that he is fifty-five years old, and that he is not comprised in the generalities of the law of which he was apprised. This was read, and he agreed to its contents and signed it. All of which I certify.

FRANCISCO GUTIERREZ DE ARROYO.

Before me.

MIGUEL MENDEZ.

In the city of Havana, on the day, month, and year aforesaid, I went to the house of Don Vicente Sebastian Pintedo, surveyor-general for his Majesty, from whom I received the oath, which he took in the usual form, to tell the truth, and having examined him as I did the preceding witness, he said: That having remained in Pensacola he knows and is

certain that, during the movements and actions between the American Indians and the English subjects of Great Britain, the house of Forbes and Company, established there by royal permission to treat with the Indians, suffered damages to the greatest amount as well in Pensacola as in Perdido and in Appalachicola by the events and causes which they had narrated, and that although the deponent can not estimate to how much their damages and injuries did amount, still he believes it to be a considerable sum; and likewise, that they have at all times rendered important services to the troops of that garrison and to the King, our lord (on which subject there must exist evidence in the secretary of this Government), and he answers that all he has stated is the truth under oath, his being of age and not comprised in the general provisions of the law of which he was apprised.

This was read to him and he assented to it and signed the same, which I certify.

VICENTE SEBASTIAN PINTADO.

Before me.
MIGUEL MENDEZ.

459 In the city of Havana on the day, month, and year aforesaid I went to the house of Don Francisco Guerrero, captain of the regiment of Louisiana, from whom I received the oath in the usual form, which he took, of telling the truth, and being examined as the preceding witnesses he said: That having resided a long time in Pensacola that he knows and is certain that during the movements and actions between the American Indians and the English subjects of Great Britain the house of Forbes and Company, established by royal permission for the trade with the Indian tribes, suffered damages to the greatest amount; that during the residence of the Colonel Nichols the said Indians did carry away and secrete a good many of their negro slaves, this taking place when Naubine became their chief and compelled them to steal negroes and commit other crimes and misdeeds. That they carried away the number of cattle, oxen, and horses designated, reducing the [sic] ruin the factories which they had established on the rivers of Appalachicola and Perdido, and altho' government made several demands for the restitution of the large amount of goods taken from Forbes and Company nothing was obtained, the firm being entitled to claim them from the Sovereign. That there is no doubt they may amount to the sum of one hundred thousand dollars asked by them by an approximate calculation.

Likewise, that there is no doubt of the important services which they have rendered at all times to the troops of that garrison and to the King, our lord, of which there must exist evidence in the secretary of this Government; and he further states that all he says is the truth under oath; that he is of age; that he does not come within the general provisions of the law of which he is apprised. And all this was read to him, to which he assented and signed, to which I certify.

FRANCISCO GUERRERO.

Before me.
MIGUEL MENDEZ.

In the city of Havana on the same day of the month and year aforesaid, in virtue of the orders received I went to the house of Don Francisco Morales, captain of the regiment of Louisiana, of whom I received the oath, which he took in the usual form, to tell the truth, and having examined him after the same manner as the preceding witnesses, he
460 said that having resided a long time in the place of Pensacola, and particularly during the movements and actions between the American Indians and the English subjects of Great Britain, he knows and he is certain that the house of Forbes and Company, established there by royal permission to trade with the Indian tribes, has suffered the injuries which are stated in the writing of the first, for it is evident that during the residence of Colonel Nichols the said Indians did carry away and hide many negroes—their slaves—this happening while Naubine made himself their chief and compelled them to steal the negroes and commit divers other crimes and misdeeds. That they carried away the number of cattle, oxen, and horses designated, reducing to ruin the factories which they had established on the rivers Apalachicola and Perdido, and altho' the Government made many demands for the restitution of the large amount of goods taken from Forbes and Company nothing was obtained, the firm being entitled to claim them from the Sovereign. That there is no doubt that they may amount to the sum of one hundred thousand dollars asked by them by an approximate calculation.

Likewise, there is no doubt of the important services which they have at all times rendered to the troops of that garrison and to the King, our lord, of which there must exist evidence in the secretary of this Government. And he further says that all he has here said is the truth under oath, and that he is of age, and that he does not come within the general provisions of the law of which he is apprised. All of which was read to him, to which he assented, and signed it, of which I certify.

FRANCISCO MORALES.

Before me.

MIGUEL MENDEZ.

461 *January 10th*

HAVANA (*February 20th*), 1818.

Seen: Together with the foregoing papers which were ordered to be sent to the consulta by a provision of the 6th of the present month considering its merits and who produces this record (expedientes), in which the house of Forbes & Company, established by royal permission in the place of Pensacola to trade with the Indian tribes, claims an indemnification of one hundred thousand dollars for effective losses from damages and injuries sustained during the movements and actions between the said American Indians and the English subjects of Great Britain whilst Colonel Nicholes remained there, and Naudbine rendered himself chief of them, instigating them to commit every sort of robbery, for which at that time the due demands were made without obtaining any restitution to the house of Forbes for the negroes and other animals and goods of which they were unjustly deprived, and considering on the other side that the tract of land they ask to be adjudicated to them in payment or compensation for the said sum never can amount to this sum in a very thinly settled province, in which lands remain uncultivated for want of persons

to attend to their culture according to the information which have been taken, and particularly that of the surveyor-general of His Majesty, Don Vicente Sebastian Pintudo [sic], and that Don John Forbes, chief and principal partner of the house, by taking possession of it will be able to benefit the province and bring colonists to establish themselves in it, rendering fruitful for the benefit of the State what now is desert and sterile, which considerations have moved the worthy soul of His Majesty in his royal cedula of the 10th of August, 1815, to offer lands to those who would choose to settle in the island of Porto Rico as the best means to be employed for the increase of the settlement.

His excellency immediately said that, using the power belonging to him, he applied and had applied the said land to Don John Forbes and Company, agreeable to the boundaries and points designated in the writing of the first sheet, remaining by the same deprived of all right to claim from the royal exchequer the losses and injuries which they may have experienced, for by its value, whatever it may be, they remain compensated for all and the claims of indemnification which they had established stand canceled. And let the commandant of the said
462 place of Pensacola, in virtue of this resolution, put him in quiet and peaceable possession of the aforesaid land, for which object his excellency (this word written over the word ordered) ordering that the necessary evidence be given to the house of Forbes, the original being filed in the archives.

Tax, 32 rials. paid.

CIENFUEGOS. DEL MONTE. MIGUEL MENDEZ.

I certify that on the same day I communicated all this to Don John Forbes. Colin Mitchell.

MENDEZ.

Habana, and Dec. 18, 1818. Let this be carried to the assessor-general, Cienfuegos.

YOUR EXCELLENCY: The house of Forbes and Company, merchants in Pensacola, through their attorney in this city, say to your excellency that in the midst of the disturbances and confusion caused in the public archives at that place by the entrance and possession which the American arms took of it he has kept the original act or despatch which Don Joseph Masot, civil and military commandant of the province of Florida, did despatch in consequence of the one sent to him by the superior government upon the indemnification of damages claimed by the petitioners and wishing to receive two authenticated copies (testimonios), one to annex to the record (expediente) which exists in Pensacola, and the other to keep. And therefore he supplicates your excellency to order the escribano of Government to furnish him with the two copies he asks for, for which he implores as a favor.

Havana, December 17th, 1818.

COLIN MITCHELL.

(In the margin of the above is written:) Let this be carried to the Assessor-General Cien Fuego.

463 Havana, December 18th, 1818. Seen: The aforesaid document which has been presented. Let the house of Forbes & Company be furnished with the copies (testimonios) requested.

CIENFUEGO.

Tax, 6 rials paid.

DEL MONTE. MIGUEL MENDEZ.

I certify that on the same day of the month and year aforesaid I communicated this to Don Colin Mitchell.

MENDEZ.

Don Joseph Masot, colonel of the Royal Corps of (Engineers) Artillery, civil and military commandant of the province of West Florida, subdelegate of royal finances in the same, &c.

In consequence and execution of the foregoing superior decree of his excellency the captain-general of this province of the 10th of this month and year, by which by way of indemnification he grants to the house of Forbes and Company a tract of land situated between the Appalachicola River to the east, the Choctaw-hatchie to the west, the sea to the south, and to the north by a line beginning opposite the creek known by the name of Agua-dulce or Sweet Water Creek, situated on the east side of the Appalachicola, and about 3 1/2 miles north of the place known by the name of Allum Bluff, and thence running west until it strikes the Choctaw-hatchie, and thence following the sinuosities of the said river to its mouth in the Bay of Santa Rosa, following thence the eastern shore of it to the sea, the high-water mark of which forming the southern boundary until it intersects the line of the lands which the said house has already acquired west of the Appalachicola, and which begins opposite the western end of the island of Saint Vincente, and thence following the line of the said lands to the Appalachicola, and thence following the course and sinuosities of the aforesaid stream until striking the point of departure of said line, which serves as a limit to the north opposite to the aforesaid Sweet Water Creek.

Therefore and in compliance with the aforesaid decree of his excellency of the tenth of the present year, I put the house of Forbes
464 & Company in possession of the tract of land described and in consequence I declare them and put the aforesaid company in full and entire dominion of the land aforesaid, that they may enjoy, possess, sell or alienate it as their own property according to the terms they may best choose.

In faith of which I have caused the present to be despatched signed with my hand, sealed with my coat-of-arms, and countersigned by the underwritten Secretary of this Government and subdelegation on the 23rd of (January) March 1818. Jose Masot—Carlos Reggio—Place of the Seal.

This is in conformity to the original which I returned to the party and to which I refer. And in virtue of what has been ordered I put the present. Havana December 19th 1818. Certified
The word "Engineers" no good Between lines to tenth— Corrected
is rightly erased ~~"January rightly interlined at the 19th line~~
January— Good (Sic.)
flourish— Miguel Mendez.

The Escribanos of the King our lord and of his Royal College of this city who sign here do certify that Don Miguel Mendez, of whom the aforesaid copy (testimonio) is authenticated is likewise an Escribano of His Majesty, Lieutenant Mayor of the Government and Corporation, faithful, loyal and trustworthy and that he practices with approbation, that full faith and credit have always been given in both tribunals to his flourish (semesantes). Havana 19th of December 1818. A flourish A flourish A flourish Juan de Dios Corona—Jose Manl. Navarro—Jose Nuno de Cueto. (Sic.)

~~A true translation~~

~~(Signed) Achillo Murat.~~

(Seal of Notary's & Escribanos of Habana.)

(This paper is endorsed:) "# 210 P 225 L. U. S. District Court Southern District of Florida. Dalcour vs. U. S. Filed in evidence by defendant as Exhibit 3; (Copy) Dec. 30' 1903. R. B. Archibald, spc'l master. Filed Mar. 17, 1904. E. O. Locke, clerk."

465 EXHIBIT 5.

Extracts from record of Superior Court of West Florida in the case of

JAMES AND JOHN INNERARITY AND THE heirs of John Forbes
vs.
THE UNITED STATES. } (P. 296.)

In the above-entitled cause the petitioners, to establish the facts alleged in their petition and in support of the prayer thereof, will rely on the following documents and papers, to wit:

1st. The original grant for the land in controversy lately obtained by the defendants from the proper offices of the Spanish Government and now before the court by process of spa. duces tecum.

2nd. A copy of that grant as recorded in the land office, and the record thereof as filed and recorded in said land office, and the report of the United States commissioners thereon as contained in a printed letter from the Secretary of the Treasury transmitting copies of the reports of the commisioners of land claim in East and West Florida, bearing date the 21 Feb., 1825 (document 111.)

3rd. Report and list transmitted by order of the King of Spain to the United States of all the titles to lands granted by Spain in the two Floridas, from 1801 to the 24 January, 1818.

4th. An official letter from the Capt. Gen'l of the island of Cuba to R. K. Call, esq., agent of the United States, for the purpose of procuring official evidence of such grants as had been made in the Floridas.

(Signed) SAM'L ACRE & BLOUNT,
Sol'rs for Petitioners.

To Messrs. ALLEN & CALL,
Sol'rs for Defts.

Filed 25th September, 1830. (Signed) Geo. F. Baltzell, clk.

* * * * * * *

467 (EX. 6.)

TALLAHASSEE, *5th Apl., 1830.*

DEAR SIR: My visit to the island of Cuba having been protracted until a short time since and my continued engagements since my return has prevented me from giving an earlier reply to your letter of the 25th of February.

While at Havana I succeeded in obtaining the original documents in the following cases: The grant to Arredondo & Son for twenty-four miles square, the grant to John Forbes & Co. east of Appalachicola River, the grant to John Forbes & Co. west of Apalachicola, the grant to Panton Leslie & Co., and the grant to John Forbes individually for an island in the river Appalachicola. The four last grants contain more than four millions of acres. They present a front of near two hundred miles on our coast, and include three of the principal sea ports of the Territory.

The papers in the case of Arredondo & Son appear to be genuine, and the character of the grant does not seem to be altered by the production of the original documents.

The one of John Forbes & Co. east of the Appalachicola bears evident marks of fraud. The consideration of the original deed from the Indians is yet blank, though the copy on which the claimants have founded their action contains the sum of $19,387 four and a half rials.

The deed was not executed by the *the* representative of the Seminole Indians, to whom the land belonged (if the right of an Indian tribe was acknowledged by the Spanish Government, which I do not admit), but was signed by twelve Indians, most of them obscure individuals of "the lower towns of the Creek Nation." These people, as well as that from whom the debts are said to have been due to the house of Forbes & Co., and for the payment of which the land was sold, resided within the jurisdiction of the United States. Within the limits of this grant is situated the fortress of St. Marks, which, at the date of *of* the sale was garrisoned by the troops of Spain, and which was subsequently delivered to the American commissioners as public property. Perhaps a greater absurdity could not be conjectured than that which is involved in the
468 supposition that the Indians located within our limits had a right to sell to the subjects of a foreign power a Spanish fortification while in the occupancy of the troops of the crown. But strange as it may seem, this is the foundation of the claim.

The proceedings in the case of Penton, Leslie & Co. are more formal, but the grant is liable to the following objections: It was made subsequently to the death of Punton & Leslie. The deed was not the act of the Seminole Nation, but was signed principally, not by the chiefs, but by obscure individuals who reside within the jurisdiction of the United States. The debts said to have been due the bank of Panton, Leslie & Co. were not contracted with the Seminole Indians, but the Upper and Lower Creeks. The list of debtors accompanying the original papers exhibit a large majority of English and American names, against many of whom sums of three and four thousand dollars are charged. One of these individuals, I believe, we shall be able to prove was a clerk in the house of Panton, Leslie & Co. Both of these sales are said to have been confirmed *confirmed* by Governor Folch, then at the head of the civil and military departments of West Florida. But I think I am warranted in the belief that this part of the proceedings is spurious.

Among the original papers, which I obtained from the archives of Havana, are two separate and distinct documents purporting to be copies of the orignal acts of confirmation by Gov. Folch, which were delivered to the claimants, and yet these claimants have founded their action on other copies which bear the same certificate of authentication, signed at the same time and by the same officers, without attempting to account in any manner for the absence of the original deed of confirmation, which is certified to have been delivered to them. There are other grants on which fraud may be presumed. On the 28th day of November, 1806, after the Indian sales to Panton, Leslie & Co. had been completed, John Forbes, one of the partners, petitioned Folch for a confirmation of those sales. On the same day writes on the margin of the petition "as he asks Folch."

All these papers, with a plat of the land, are bound in the same
468½ paper book, but on the 3d of December, 1806, only six days after, a new paper book is found containing this certified copy of the deed of confirmation by Folch, though there is no new petition of the party accompanying this deed. The same thing occurs in the grant to Forbes & Co. in 1811, and the official certificate of both copies have dates the 20th of December, 1811. I am myself perfectly convinced that the long and formal act of confirmation, which you will find in the 7" vol. of Executive Papers accompanying the report of the commissioners of West Florida, is spurious and that it never was executed by Folch. But should I be mistaken in this belief, there are other fatal objections to both these claims. I have obtained the most ample and conclusive evidence of the total want of power on the part of Governor Folch to make or confirm grants of land in West Florida after the 31st of March, 1806, and the treaty, as well as the several acts of Congress for carrying it into effect, having only provided for the confirmation by our Government of such grants of land as were made in Florida by "His Catholic Majesty or his lawful authorities" this claim must be rejected.

The grant to John Forbes & Co. west of the Appalachicola calls for million and a half of acres, but from its boundaries must contain more than twice that quantity. It bears upon its face conclusive evidence of its fraudulent character. In order to bring it within the provisions of the 8th article of the treaty, which renders void all grants made subsequent to the 24th day of January, 1818, the original dates have been

erased and others inserted. This occurs in the date of every document from the first decree of the capt. genl. of Cuba to the act of confirmation by Gnl. Mosat. The original dates were February and March, and they have been altered to the 10th and 23d of January, 1818.

The claim of John Forbes for an island in the River Apalachicola containing seven thousand acres depends alone on a deed of gift from a few of the Indians residing within the jurisdiction of the United States. I have thus endeavored to give you a brief view of some of the prominent objections to the cases above enumerated, and shall be happy to receive your opinion on the several points presented or any other suggestions which you may be pleased to offer.

469 In the course of my examination I find reference made to a treaty between Great Britian and the Indians previous to the year 1765, at Augusta, by which all the seacoast as high as the tide flows was deeded to the latter Government. If this treaty could be procured it would show that the Indians of Florida conveyed their rights to the sea board of this Territory to the English, and consequently that Spain acquired the same rights by the treaty of 1783. This would put the Indian title to rest.

I am, sir, very respectfully, yr. obdt.,

R. K. CALL.

Mr. WM. WIRT.

(This paper is endorsed:) "Filed in evidence marked 'Exhibit No. 6.' R. B. Archibald, special master, Dec. 30, 1903. #210. P. 225, No. 6, Defdt. Dalcour vs. U. S. U. S. District Court Southern District of Florida. Filed Mar. 17, 1904. E. O. Locke, clerk."

470 7.

No. 23377. United States of America, Department of State, to all to whom these presents shall come, greeting:

I certify that the documents hereto annexed are true copies from records of the Department.

In testimony whereof I, John Hay, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed. Done at the city of Washington this 5th day of February, A. D. 1904, and of the Independence of the United States of America, the one hundred and twenty-eighth.

[Seal of Dept. of State.] JOHN HAY.

Andrew Jackson, President of the United States of America, to Richard K. Call, of Florida, greeting:

Whereas, by the second article of the treaty of amity, settlement and limits, concluded at Washington on the 22d day of February, 1819, between these United States and His Catholic Majesty it is stipulated as follows: "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, known by the name of East and West Florida; the adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other

buildings which are not private property, archives and documents which relate directly to the property and sovereignty of said provinces are included in this article. The said archives and documents shall be left in the possession of the commissaries or officers of the United States duly authorized to receive them." Now, therefore, I do hereby authorize and appoint you, as commissary of the United States, to receive from any and every person who may be possessed of the said archives and documents, all and every one of the same; and the said archives and documents to keep in safe custody, until further order for the disposal of the same shall be taken.

471 Given under my hand and the seal of the said United States at Washington this third day of April, 1829, and in the fifty-third year of the Independence of the United States.

[L. S.] ANDREW JACKSON.

By the President.

M. VAN BUREN, *Secretary of State*

(Endorsed:) "210. 225. L. 1. U. S. District Court Southern District of Florida. Dalcour vs. U. S. 7. Filed in evidence by defendant and marked "Exhibit 7." R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk.

* * * * * * *

479½ These three maps were filed with report of Master R. B. Archibald as "Exhibit D," and were endorsed "210–225–L. 1. U. S. District Court, Southern district of Florida. Dalcour vs. U. S. D. Filed in evidence as Exhibit D, Dec. 28, 1903. R. B. Archibald, special master. Filed Mar. 17, 1904. E. O. Locke, clerk.

(Here follow maps marked pp. 480, 481, & 482.)

483 District Court of the United States, Southern District of Florida.

THEODORE DALCOUR ET AL.
vs.
THE UNITED STATES. } No. 210.

I, Eugene O. Locke, clerk of said court, hereby certify that the foregoing document, consisting of typewritten, written, and blank pages, maps, drawings, and inserts, numbered from 1 to 483, inclusive, are a full, true, and correct copy of the record in the above-entitled cause, as the same appears from the files and records in my office at Jacksonville, Florida, saving and excepting certain papers which have been omitted therefrom by consent, agreement, and direction of the respective counsel, W. W. Dewhurst, for plaintiff, and J. N. Stripling, district attorney, and Robt. O. Howard, for the United States, as duplicating and otherwise cumbering the record.

In testimony whereof I hereunto set my hand officially and affix the seal of said court, at Jacksonville, in said district, this tenth day of June, A. D. 1905.

[SEAL.] EUGENE O. LOCKE, *Clerk.*

FOLD OUT IS TOO LARGE TO BE FILMED

484 In the Supreme Court of the United States, October term, 1905.

THE UNITED STATES, APPELLANT,
v.
THEODORE DALCOUR ET AL. } No.

Stipulation for printing record.

It is hereby stipulated and agreed between Henry M. Hoyt, Solicitor-General for the United States, appellant, and William W. Dewhurst, esq., and W. A. Blount, esq., solicitors for the appellees, that the following specified parts of the record which the parties think necessary for the consideration of the court upon the assignments of error herein shall be printed as the record in the case.

H. M. HOYT,
Solicitor-General.

WILLIAM W. DEWHURST,
W. A. BLOUNT,
Solicitors for the Appellees.

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486 (Indorsed: File No. 19826. Supreme Court U. S. October term, 1905. Term No. 324. The United States, appellant, vs. Theodore Dalcour et al. Stipulation as to parts to be printed. Filed Sept. 28", 1905.

(Indorsement on cover:) File No. 19826. S. Florida D. C. U. S. Term No. 324. The United States, appellant, vs. Theodore Dalcour et al., heirs of John Forbes, deceased, et al. Filed July 3d, 1905. File No. 19826. Office of the clerk of the Supreme Court U. S. Received June 12, 1905.

O

FILE COPY.

Office Supreme Court, U. S.
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OCT 17 1906
JAMES H. McKENNEY,
CLERK

No. 69.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al. } No. 69.

Appeal from the District Court of the United States for the Southern District of Florida.

BRIEF FOR APPELLANT.

STATEMENT.

This suit was commenced by petition filed in the District Court of the United States for the Northern District of Florida, on March 3, 1875, by the heirs of John Forbes, under the provisions of the act of Congress approved June 22, 1860 (12 Stat. L., 83), "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes," extended by two subsequent statutes, to continue in force until June 10, 1875. The petitioners claimed an immense tract of land, containing 1,850,000 acres, by virtue of a grant made by

Cienfuegos, Captain-General of Cuba, dated January 10, 1818. (Tr., p. 7.)

On October 24, 1878, an amended petition was filed, by leave of the court, making the heirs of James and John Innerarity additional parties complainant, and stating that the grant relied on was made to John Forbes & Co., instead of to John Forbes, and that James and John Innerarity were partners of John Forbes; but in the order allowing these amendments was an express "saving to the United States all rights and exceptions which may arise under the statute of limitations." (Tr., p. 18.)

All the original papers in this case were lost by the fire which destroyed the United States courthouse in Jacksonville on May 19, 1891. On June 14, 1900, an application was made by petition to the District Court for the Southern District of Florida, praying for the restoration of these destroyed records and files (Tr., pp. 1–7). An answer was filed to this petition in which, among other things, it was contended against the reestablishment of the record, that the original petitioners had ceased to prosecute the matter long prior to the alleged destruction of the files and that the petitioners were guilty of gross laches by neglecting for ten years since the alleged destruction of the documents sought to be established to file their petition for restoration of the same (Tr., p. 47). An order, reciting the substance and effect of certain lost records and files, was made on May 8,

1901 (Tr., pp. 52–54). On October 18, 1901, petitioners presented their bill of revivor, to which defendants interposed a demurrer, which was overruled. The order of the court permitted the survivors of the parties to the original and amended petition to prosecute the suit for themselves and all others in interest, but, as in the order allowing the amendment making new parties, reserved the question of laches and the running of the statute of limitations. (Tr., pp. 60–62).

Afterwards a plea and motion to strike the amendment of 1878 were successively interposed by defendant upon the grounds of laches and limitation; but these were overruled. (Tr., pp. 62–67.)

Between the time of the allowance of the amended petition in 1878 and the time of the application to restore the record which had been destroyed in the fire of 1891, no steps appear to have been taken in prosecution of this suit, except an order to take testimony before a master at New Orleans on December 16, 1878.

The petition and amended petition (Tr., pp. 7–17) assert a claim of the parties named as descendants and heirs of the members of the firm of John Forbes & Co., by virtue of a grant made by the Captain General of Cuba, on the 10th day of January, 1818, to a tract of land in the country known as West Florida, comprising about 1,850,000 acres, described as follows: Commencing opposite to the mouth of the Sweetwater Creek, on the Apalachicola River, the line runs due west as far as the

river Choctawhatchee, when it follows the course of said river to its mouth in the Bay of St. Rosa, then runs eastwardly along the shores of said bay and the sea (meaning the Gulf of Mexico) to the mouth of the Apalachicola River, and up said river to the place of commencement. The consideration for the grant is stated to have been indemnity for losses in the sum of $100,000, claimed to be due from the public treasury of Spain, Florida, and Cuba.

The petition further alleges that this grant was sent to the governor of the province of West Florida, who, on the 23d day of January, 1818, put John Forbes & Co. in possession of said property.

The petition further states that this claim was presented to commissioners for examining and ascertaining claims and titles to land within the districts of East and West Florida, in pursuance of an act of Congress; and that facts in connection therewith were reported to Congress by said commissioners and printed in American State Papers, Public Lands, Volume IV, pages 94–96. The facts ascertained by this report, it is asserted, are to be received as proved.

The petition explicitly states that this grant was made before the 24th day of January, 1818; and that the possession and title of John Forbes were specially protected by the eighth article of the treaty of cession.

The petition further shows that the lands claimed have been surveyed, and by preemption grants, do-

nations, or in some other manner large quantities of them disposed of by the United States. Exhibits are attached showing the surveyed areas and disposition of the lands.

Certain allegations are made as to the authority of the Captain-General to make the grant and giving reasons for the failure to commence proceedings for possession earlier. And it is particularly alleged that at no time whatever has a report of land commissioners been made adverse to their claim now presented, nor any report suggesting fraud, favoritism, or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity, nor has it been acted upon by Congress at any time.

The petitioners pray for a judgment for the land described, that all the titles derived by any person, corporation, or State for portions of this land be confirmed to them, as against the plaintiffs, but that the plaintiffs have in lieu and stead thereof the same area of land scrip or warrant, to be taken in bodies of not less than 80 acres; that a patent issue to them for the land remaining unsold and their title be affirmed by the Government; and that they have judgment for the soil and waters of St. Andrews Bay.

To this petition the United States answered (Tr., pp. 67–80) that the whole matter of the suit had been already litigated between the parties and their privies and the defendant, and a judgment

rendered on the merits of the case in favor of the defendant. The defendant admitted that the claim in this proceeding had been presented to commissioners and that a report had been made thereon, but averred that under the provisions of the act of Congress of May 23, 1828, the claim was presented to and received and adjudicated by the judge of the Superior Court of the Western District of Florida; that the transcript of the grant and accompanying papers and evidence before the commissioners was presented and received in evidence; that the original grant, which was obtained from the Spanish archives at Havana, was received in evidence; that the decree was made rejecting the claim, and that no appeal was taken from this decree.

The answer denies the jurisdiction of the District Court because there is no legislation authorizing the bringing of this action, and especially denies that any authority therefor is found in the act of June 22, 1860, under which the petitioners claim to have proceeded; and says that the provision of the act of 1828, that decrees made thereunder should be final and conclusive, was not repealed by the act of 1860; that claims which have been declared to be invalid from intrinsic defects, or fraudulent, under the act of 1828, were not made valid by the act of 1860; that the claim now pending had been rejected by the tribunal and public officer acting under authority of Congress and is expressly excluded from the jurisdiction of

the District Court by the eleventh section of the act of 1860.

The answer insists that, if this proceeding could be maintained under the act of 1860, the facts found in the decree heretofore mentioned must be received in evidence equally with the facts reported by the board of commissioners recited in the petition.

The answer avers that the grant and title papers presented to the commissioners were altered and forged so as to bring them within the terms of the eighth article of the treaty of 1819 between Spain and the United States; that the grant was made without the formalities required by the Spanish laws, and without proper authority by the Captain-General; that the lands pretended to have been granted were in the possession of the Indians as their residence and common hunting grounds, and that John Forbes & Co. were never in possession of them.

To this anwer a general replication was filed. (Tr., p. 81.)

The case was referred to a master to take testimony. On March 17 the master made his report, setting out the testimony taken. (Tr., pp. 84–105 and 289–483.)

The testimony is voluminous, and was confined to the issues made by the pleadings, as hereinbefore recited.

The cause came on for hearing on May 25, 1904. During the hearing the petitioners moved the court for leave to amend by adding to the petition im-

mediately before the prayer for relief the following:

> That the grant (heretofore correctly described in this petition except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818.

This amendment was allowed by leave of the court.

Afterwards, by a *nunc pro tunc* order, by leave of the court, the defendant answered to the amendment:

(*a*) That it asserts and sets up a new and different cause of action from that asserted in the original and amended petition, in that the claimants now claim under a grant to John Forbes & Co., made on the 20th day of February, 1818, whereas by the original petition they claimed under a grant made on the 10th day of January, 1818, and that their cause of action is barred by not having been brought within the limitation of the act of 1860 extended by the act of 1872.

(*b*) Defendant denied that a grant of land was made by the Captain-General of Cuba to John Forbes & Co. on February 20, 1818.

(*c*) Defendant says that if a grant was made on February 20, 1818, it was made after January 24, 1818, and was declared and agreed to be null and void by the terms of Article VIII of the treaty

between the United States and Spain of February 22, 1819. (Tr., p. 111.)

The petitioners filed a general replication to this answer. (Tr., p. 116.)

The case was taken under advisement, and on December 5, 1904, a decree was entered that the grant by Cienfuegos, the Captain-General of Cuba, to John Forbes & Co., made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, * * * is a valid, just, and binding title against the United States. (Tr., p. 107.)

Reference to the master was again made to ascertain and report, according to the United States surveys, the lands within the boundaries of the grant yet unsold by the United States, and the area according to said surveys of the lands sold by the United States.

Upon the coming in of the master's report, and defendant's exceptions thereto, the exceptions were overruled and the report confirmed. The court then, on April 8, 1905, made and entered the final decree, by which the interlocutory decree of December 5, 1904 was affirmed and the grant therein described decreed to be a valid, just, and binding title against the United States; that lands—describing them—undisposed of under the land laws of the United States within the boundaries of the grant, containing an area of 79,681.49 acres, are the property of the legal rep-

resentatives of John Forbes, James Innerarity, and John Innerarity, and that they are entitled to recover said lands as against the United States and to receive from the United States a patent or patents for the same, and that the petitioners and their survivors and assigns are entitled to enter any of the public lands of the United States to the amount and extent of 1,190,495.45 acres, said entry to be made in conformity to the requirements of the sixth section of the act of Congress of June 22, 1860, etc. (Tr., pp. 117–132.)

The decree was filed without an opinion.

From this decree defendant prayed for and was allowed an appeal. An assignment of errors was filed with the petition for appeal, as follows (Tr., pp. 132, 133):

I. The court erred in making the decree of May 8, 1901, restoring to the files of the District Court papers claimed to be copies of the original files in this case.

II. The court erred in overruling the demurrer to the bill of revivor filed herein.

III. The court erred in granting the motion of the claimants to strike from the files the plea of the defendant to the bill of revivor.

IV. The court erred in denying defendant's motion to strike the amended petition from the files.

V. The court erred in granting the motion made by the claimants, at the hearing of the cause, to amend the petition by adding immediately before

the prayer for relief therein the words following, viz: "That the grant (hereinbefore correctly described except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818."

VI. The court erred in ordering, adjudging, and decreeing that the grant by Cienfuegos, the Captain-General of Cuba, to John Forbes & Co., made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for the lands described, was a valid, just, and binding title against the United States.

VII. The court erred in decreeing that the petitioners herein were entitled to receive from the United States a patent for all the described tracts of land not sold or otherwise disposed of by the United States and entitled to enter any of the public lands of the United States, liable to private entry at $1.25 per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the described tract, according to the sixth section of the act of Congress approved June 22, 1860.

VIII. The court erred in deciding that a claim for lands in West Florida, by virtue of a grant made by the Captain-General of Cuba on the 20th

day of February, 1818, could be confirmed under the provisions of the act of Congress approved June 22, 1860.

IX. The court erred in deciding that a grant of lands in West Florida, made by the Captain-General of Cuba, since the 24th day of January, 1818, was not null and void by virtue of the eighth article of the treaty between the United States and the King of Spain of the 22d day of February, 1819.

X. The court erred in overruling the exception to the report of the master that there had been 1,190,495.45 acres of land, within the boundaries of the grant as described in the petition herein, disposed of by the United States.

ARGUMENT.

I.

The decree should be reversed because the several amendments to the original petition made a different cause of action, which was barred by the limitation of the act of 1860 as extended by the act of 1875.

The provisions of the acts of 1860 and 1872, relating to the time in which suits were to be brought, were statutes of limitation.

> The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within [the time specified] and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right. (*The Harrisburg*, 199 U. S., 199, 214.)

An amendment of the declaration or complaint, after the statute has fully run, which introduces new parties plaintiff, presenting a new or different cause of action, is barred by the statute.

In *Gray et al.* v. *Trapnall et al.*, 23 Ark., 510, 512, the court said:

> Samson Gray having died in 1835, his heirs brought this suit on the 20th of January, 1858; and tho the youngest of the plaintiffs, Thomas W. Gray, was more than twenty-five years old, the plaintiffs claim that, in consequence of a suit having been begun in Chicot County for this land, against the same defendants, within less than three years after Thomas became twenty-one years old, its dismissal and the beginning of this suit within a year thereafter, all of the plaintiffs are entitled to an adjudication of their rights, free from the effect of the statute of limitations. Before the beginning of the suit in Chicot County, two of the plaintiffs, Jacob S. Gray and Samuel R. Gray, had enjoyed the full time given by the statute in which to assert their right to the land by suit. Being infants at the death of their father, each of them had three years after becoming of age in which to sue, but after that time the interest of each was barred. The opinion of Scott, J., in *Lytle* v. *The State* (17 Ark.), has been adopted by this court, upon full consideration of the proper construction of our statute of limitations, in *Wilder* v. *Mays* (23 Ark.), and it follows that whatever were the rights of the heirs of Samson Gray to the land in controversy, the courts were closed to the two older plaintiffs when they first made their claim by the bill filed in chancery in Chicot Circuit Court.

See in this connection *Lytle et al.* v. *The State*, 17 Ark., 608, 649; *Marstellar* v. *McClean*, 7 Cr., 156; *Bennington* v. *Dinsmore*, 2 Gill (Md. 348); *United States* v. *Martinez*, 196 U. S., 459.

This original suit was filed March 3, 1875, by the heirs of John Forbes to confirm a title to lands claimed by virtue of a grant to John Forbes. The time for the commencement of suits under the statute expired on June 10, 1875. In February, 1876, the heirs of James and John Innerarity asked to intervene in this suit on the ground that the grant was made to John Forbes in trust for himself and the Innerarityes, who were his partners in the house of John Forbes & Co.

This application was denied, tho for what reason is not shown. (It is not pretended the supplied record is complete; the evidence in support of the substitution shows it is not.) It may have been from a misapprehension of the laws of Spain as to the person holding the legal title or from an endeavor to save the rights of the heirs of James and John Innerarity from the bar of the statute. However that may be, nothing further was done until December 14, 1878, when the heirs of John Forbes and of James Innerarity and of John Innerarity presented an amended petition, in which it was stated that the grant originally stated as a grant to John Forbes was a grant to John Forbes & Co., and that John Forbes & Co. was a partnership composed of John Forbes and James and John Innerarity. The allowance of this amend-

ment must have been opposed, for the court in permitting it directed "all rights and exceptions arising under the statute of limitations to be saved."

It seems clear that this suit can not be maintained by the heirs of James and John Innerarity. If the heirs of Forbes and the heirs of Innerarity were tenants in common then the several parties in interest must be brought within the limitation. The heirs of Forbes were within the proper time, if the title can be established; the other heirs were not. Thus, in *United States* v. *The Heirs of James Innerarity* (19 Wall., 595), it was held that the heirs had filed their petition in time, but that Innerarity had no claim in law or equity to the land. The court said, as applicable to the double departure we object to:

> The attempt to set up a claim under this petition or a supplemental petition by Innerarity's heirs in favor of the heirs of John Watkins, can not be sustained. It does not appear that Watkins derived title from Innerarity or that Innerarity ever had any title. The case is simply this: Innerarity's heirs have filed their petition in time, but have no title. Watkins's heirs have a title, but have not filed a petition for its allowance. Watkins's title can not be interposed by the present petitioners. Such practice is unknown. If a suit be commenced by A to recover land or money, he, failing on the merits, can not bring into his suit a new

> plaintiff, especially one whose action, if then commenced, would be barred by the statute of limitations. If otherwise, the same suit can be continued indefinitely, constantly making new plaintiffs, until some one shall be found who has a meritorious claim. It would be a practical abrogation of the limitation of the statute.

Afterwards a joint action was brought by the heirs of Watkins and Mrs. Simpson, assignees of this same Ramos grant (*United States* v. *Watkins*, 7 Otto, 219, 223). Mrs. Simpson filed an amended petition in which she admitted she had sold her share to James Innerarity, but whether in his individual capacity or as partner of Forbes & Co. she could not say; she asked to prosecute the suit for the benefit of the legal representatives of Innerarity. The court said:

> The fact that Simpson and Watkins were tenants in common of undivided moieties in the land, can produce no inconvenience in making a decree in favor of Watkins's heirs for one-half of the amount of land in controversy. * * * By the admission of Melanie Bringier (Mrs. Simpson), she has parted with all title to the lands. It is evident that no decree can be made in her favor. The heirs of Innerarity have already been before the court, and their claims have been rejected.

Assuming, then, that the heirs of the Innerarityss can not prosecute this claim, can the heirs of John

Forbes do so? Their real interest was, for the first time, disclosed in the amendment of 1878, three and a half years after the statutory bar. It is true that, in accordance with the provisions of the seventh section of the act of 1860, in the original petition the report of a board of commissioners is referred to and deposited as an exhibit. But this report is on a claim of John Forbes & Co. (American State Papers, Public Lands, vol. 4, pp. 169, 172, Ed. G. & S., 1859.) By the amendment it is acknowledged that the heirs of Forbes could only recover one-third of the amount of land in the grant. In the original petition they claimed all the lands, but their evidence—the facts reported by the commissioners—showed they were only entitled to a share, without ascertaining what that share was. No decree could have been rendered in their favor for want of certainty in both the claim and the proofs. And when the amendment was offered it made a joint action by the heirs of all the partners in the old firm of Forbes & Co. Even the equities of the heirs of Forbes were no better than the equities of the heirs of the Innerarity's, who were barred.

However, in the event that these amendments could be allowed, there arises the question that the amendment made at the hearing, and upon which the decree was rendered, made an entirely different and irreconcilable cause of action.

The original petition as first amended claimed the lands in controversy by virtue of a grant from

the Captain-General of Cuba, made on the 10th day of January, 1818. The claimants alleged that "the possession and title of John Forbes [& Co.] was specially protected by the eighth article of the treaty of cession." The Spanish (the language of the grantor) reads: "All grants of lands made on or before the 24th of January, 1818, quedaran ratificados, y reconcidas al la personas que esten in possession de aleas: [or are confirmed in possession of them]." They further alleged: "That at no time whatever has a report of land commissioners been made adverse to their claim now presented nor any report suggesting fraud, favoritism, or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity, nor has it been acted upon by Congress at any time." They further alleged: "That the eighth article of the cession binds the United States to confirm the title of John Forbes [& Co.] to those lands of which we had possession under a title in all respects perfected at the date of the treaty."

By the amendment at the hearing all these allegations were abandoned. It was acknowledged that there was no grant of January 10, 1818, nor any confirmation by the eighth article of the treaty of 1819. It was asserted that petitioners relied upon a grant made on February 20, 1818, altered so that it purports to have been made on January 10, 1818.

If the court had a discretionary power to allow

such an amendment, it seems strange that it should look with favor upon this application. The *Registro*, thus asked to be used as proof of title in the claimants, is not mentioned in their original pleadings, nor was it introduced in evidence by them. It first appears in the answer as borrowed from the case before Judge Brackenridge in 1830. The paper was taken from the records of that case and presented by the defendant. Its legal effect in each case was to show that the muniment of title declared on was a false, forged, antedated paper.

The arguments and speculations advanced to account for these alterations need not now be adverted to. For the purposes of this argument it is sufficient to say that the radical changes from the original petition created a new cause of action which is barred by the limitation of the acts of 1860 and 1872.

In *Union Pacific R. Co.* v. *Wyler* (158 U. S., 285) Mr. Justice White, speaking for the court, said:

> The general rule is, that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to

all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies.

The doctrine on this subject is stated in the case of *Sicard* v. *Davis* (6 Pet., 124, ——.) There the plaintiff brought an action of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815, and at the November term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. This court, speaking thru *Mr. Chief Justice Marshall*, said that "limitations might be pleaded to the second allegation, tho not to the first, because the second count in the declaration being on a demise from a different party asserting a different title was not distinguishable, so far as respects the bar of the act of limitations from a new action."

* * * * *

Other applications of the doctrine may be found in the following cases: *Toby* v. *Allen* (3 Kans., 399); *Hiatt* v. *Auld* (11 Kans., 176); *Rolling Mill* v. *Monka* (107 Ill., 340); *Crofford* v. *Cothran* (2 Sneed, 492); *Flatley* v. *Memphis & C. R. Co.* (9 Heisk., 230);

Dudley v. *Price's* (10 B. Mon., 84); *Buntin* v. *Chicago, R. I. & P. R. Co.* (41 Fed. Rep., 744); *Atlantic & P. R. Co.* v *Laird* (58 Fed. Rep., 760).

Nor do we think this question is in any way affected by the fact that the second amended petition was filed by consent. The consent covered the right to file it, but did not waive the defenses thereto when filed. If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute which had fully operated upon the new cause of action set out in the amended petition—when that petition was filed. In *Sicard's case*, *supra*, altho the amendment had been filed by leave of court, and was, therefore, a bar of the pleadings, it was held that the bar of the statute applied to the new cause of action alleged in the amendment, and the rule there enforced is followed in the other cases cited.

See also *Kendall* v. *United States* (14 Ct. Cls. R., 122; S. C., 107 U. S., 123).

II.

This Claim is Barred by the Former Adjudication Under the Act of May 23, 1828.

After the treaty of February 22, 1819, between Spain and the United States, Congress, in the determination to act liberally in preserving the rights of individuals in private property, and especially

to recognize and carry out the principles of the eighth article of the treaty, past acts, the object of which was to ascertain the titles and claims to lands in Florida: "To separate private property from the public domain, for the double purpose of doing justice to individuals and enabling Congress safely to sell the vacant lands in their newly acquired territories." The first of these acts, past soon after the ratification of the treaty of cession, was the act of May 8, 1822 (3 Stat. L., 709). By the first section it was provided: "That for the purpose of ascertaining the claims and titles to lands within the Territory of Florida, as required by the treaty of the twenty-second of February, one thousand eight hundred and nineteen, there shall be appointed * * * three commissioners, etc." The fourth section enacts:

> That every person, or the heirs or representatives of such persons, claiming titles to lands under any patent, grant, concession, or order of survey, dated previous to the twenty-fourth of January, 1818, which were valid under the Spanish Government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, before the commissioners, his, her, or their, claim, setting forth, particularly, its situation and boundaries, if to be ascertained, etc., and said commissioners shall proceed to examine and determine on the validity of said patents, grants, concessions, and orders of survey, agreeably to the laws

> and ordinances heretofore existing, of the governments making the grants, respectively, having due regard, in all Spanish claims, to the conditions and stipulations contained in the eighth article of a treaty concluded at Washington, between his Catholic majesty, and the United States, on the 22d of February, 1819, etc."

Section 5 enacts—

> That the commissioners shall have power to inquire into the justice and validity of the claims filed with them; * * * they shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed 1,000 acres; but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury, to be laid before Congress for their determination.

Under this act, John Forbes & Co. presented to the duly appointed commissioners their claim for a tract of land, undefined in quantity, but said to contain about 1,850,000 acres, and in support thereof offered in evidence a copy of a memorial, dated January 5, 1818, to the Captain-General of Cuba and the two Floridas, reciting certain losses which they had sustained from American Indians, and praying a grant of land, "which commences from the creek known as Sweetwater Creek, on the river Apalachicola, and runs directly west as far as the Choctawhatchee, following the course of said river to its mouth, on the bay of St. Rosa,

then eastwardly, winding along the shores of said bay and the sea, to the boundary of the lands on the east of the Apalachicola, formerly ceded to our house by the Indians, and running along the western boundary of said land up the said river to the point of departure."

The memorialists also offered in evidence copies of certain Spanish interlocutory decrees and a grant of the lands prayed for dated January 10, 1818.

The commissioners, after receiving other testitimony not necessary here to detail, submitted the case to Congress for their determination. Their report was transmitted to Congress by the Secretary of the Treasury February 21, 1825. (American State Papers, Public Lands, vol. IV, pp. 155–172.) No action was had upon this report.

These matters are all in evidence in this case on the part of the petitioners.

On the 23d of May, 1828, Congress past "an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." (4 Stat. L., 284.) By the sixth section of that act it was provided:

> That all claims to land within the Territory of Florida, embraced by the treaty between Spain and the United States of the 22d of February, 1819, which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above

the amount confirmed by this act: and which have not been reported, as antedated or forged by said commissioners, or register and receiver acting as such, shall be received and adjudicated, by the judge of the Superior Court of the district within which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge, and claimants in the State of Missouri, by act of Congress, approved May 26, 1824, entitled "An act enabling the claimants to lands within the limits of the State of Missouri, and Territory of Arkansas, to institute proceedings to try the validity of their claims": *Provided*, That nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain, nor any claim not presented to the commissioners or register and receiver, in conformity to the several acts of Congress, providing for the settlement of private land claims in Florida.

The seventh section provides for an appeal by claimants, "as directed in the act aforesaid, from the decision of the judge of the district, to the Supreme Court of the United States, within four months after the decision shall be pronounced."

The first section of the act of 1824 referred to (4 Stat. L., 52), provides that any person or persons, or their legal representatives, claiming lands, may present a petition to the district court, setting forth,

fully, plainly, and substantially the nature of the claim, and particularly stating the date of the grant, succession, warrant, or order of survey, under which they claim and whether the same has been submitted to the examination of either of the tribunals which have been constituted by law for the adjustment of land titles, and by them reported on unfavorably or recommended for confirmation.

By the second section it was provided that:

> Every petition shall be * * * conducted according to the rules of a court of equity, * * * and the court shall have full power and authority to hear and determine all questions arising in said cause relative to the title of the claimants, the extent, locality, and boundaries of the said claim, or other matters connected therewith, fit and proper to be heard and determined, and, by a final decree, to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived; and all other questions properly arising between the claimants and the United States; which decree shall, in all cases, refer to the treaty, law, [or] ordinance under which it is confirmed or decreed against; * * * and in all cases the party against whom the judgment or decree of the said district court may be finally given, shall be entitled to an appeal, within

> one year from the time of its rendition, to the Supreme Court of the United States, the decision of which court shall be final and conclusive between the parties; and, should no appeal be taken, the judgment, or decree of the said district court shall, in like manner, be final and conclusive.

The third section of the same act enacts:

> That the evidence which has been received by the different tribunals which have been constituted and appointed by law to receive such evidence, and to report the same to the Secretary of the Treasury, or to the Commissioner of the General Land Office, upon all claims presented to them, respectively, shall be received and admitted in evidence for or against the United States, in all trials under this act, when the person testifying is dead, or beyond the reach of the court's process; together with such other testimony, etc.

Under the provisions of these statutes, on the 2d day of December, 1828, John Innerarity, on behalf of John Forbes & Co., filed a claim for the land above mentioned. On March 24, 1829, an amended petition was filed by the surviving partners of the firm of John Forbes & Co. and the heirs of John Forbes, in which the report of the commissioners was referred to and made part of the petition. The grant of Cienfuegos was relied on as it appeared in the exemplification before the board; and it was expressly averred that the claim had not been annulled by the treaty of February

22, 1819, nor by the decree of the King of Spain ratifying the same, and was not reported by the commissioners as either antedated or forged. The petitioners claimed that the grant was made in accordance with the laws of Spain, etc., and was guaranteed by the eighth article of the treaty.

An answer was filed in which, among many other averments, was a denial of the validity of the grant and a demand for the production of the original.

At the trial the original, obtained from the archives at Havana by R. H. Call, special commissary and attorney for the United States, was presented and proved. I use the term "original" in the acceptation of the term in our own language as the title paper executed by the parties. This was, under Spanish laws, retained in the public offices and called the *registro*. Judge Brackenridge, before whom the case was heard, in his opinion says:

> The registro is the original minutes, or first draft, which remains in the office of the escribano, notary, or other officer, for safe-keeping, and is that from which the original is made out and transcribed, and by which any doubts that may arise on the original are to be determined.
>
> A public instrument is divided into three classes: The original draft, register, or protocol (registro), the original, and the copy. The register is the original draft or writing, which is delivered and remains in the pos-

> session of the escribano, which we also call protocol, by which doubts are determined that may be offered to the instruments which are copied from it. (White, New Recopilacion, quoting authorities, 207.)

This *registro* was produced by General Call in obedience to a subpena duces tecum, granted at the request of the claimants. On September 25, 1830, during the trial, solicitors for petitioners notified the defendant they would rely on this grant. On the same day, after inspection, they gave notice that the document was not the one they contemplated, and they would insist it be excluded from being received in evidence.

The *registro* was received, and upon examination the district judge determined that it contained alterations in the dates of the orders by the Spanish officers and of the grant, which, under the Spanish law, there being no salvado or notation of the errors and alterations, rendered the instrument null and void. He further said that being fully satisfied the claimants had no legal grant prior to the 24th of January, 1818, he felt bound to reject the petition. The decree was that for the reasons set forth in the opinion the prayer of the petitioners for the confirmation of the said claim to the said land be refused and rejected.

From this judgment and decree no appeal was taken. All the parties acquiesced. That the claimants were taken by surprise, on the introduction of the original draft, is probable. But that there was

any other reason for failure to prosecute their suit than belief in the invalidity of the grant seems also probable. The tract, according to their own description, bordered on the land in another grant to the same parties, comprising 1,200,000 acres, which was, at the same time, the subject of a trial before the superior court of middle Florida. James Innerarity was one of the claimants in both suits. The latter, after an adverse decision, was appealed by the petitioners to the Supreme Court (*Mitchell et al.* v. *United States*, 9 Pet., 711). The decree in the territorial court was on November 2, 1830, only four days before the judgment in the former suit not appealed.

These matters of former adjudication were pleaded in this suit and issue joined. Proofs were presented by the petitioners to sustain the grant, and by the defendant to sustain the plea.

Against the efficacy of this plea several positions are assumed by petitioners. It is urged that Judge Brackenridge did not and could not decide anything further than that the grant was made after January 24, 1818. But this is a misapprehension of the act of 1828. That statute provided that the judge should receive and adjudicate the claims according to the forms, rules, regulations, conditions, restrictions, and limitations prescribed to the district judge and claimants by the act of 1824. The very first thing required of the claimants was that they should "particularly state the date of the grant, concession, warrant, or order of

survey under which they claim." The proviso in the 6th section of the act of 1828 does forbid the judges to take cognizance of any claim annulled by the treaty of 1819. But these statutes gave the judge jurisdiction "by a final decree, to settle and determine the question of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the Government from which it is alleged to have been derived, and all other questions arising between the claimants and the United States."

This claim as presented was not annulled by the proviso of the treaty. The question directly involved in the issue was the validity of the grant. By the evidence presented by the petitioners the grant must have been confirmed. It was only upon the exhibition of the *registro* that the alterations were shown. No effort was made to account for them. They showed that a paper purporting to be a grant of January 10, 1818, had been altered from a paper in which the date had been February 20, 1818. The decree was that confirmation be refused and rejected. The reasons given were, first, that the alterations were of a nature to affect the very existence of the grant. This may refer to the fact that without the alteration the grant was annulled by the treaty.

But there was a second reason, that the instrument itself was, by virtue of the alterations, null

and void; hence there was no title, the title having no existence except in the grant. And this covers a grant claimed to have been made on February 20, as well as a grant claimed to have been made on January 10. Upon this ground rested the decree. It was because there was no grant at all that it followed there was no grant before the 24th of January. (*State's Lessee* v. *Spencer*, 1 Pet., 552.) The conclusion of law, it may be remarked in passing, was correct by the Spanish, the Roman civil, and the common law. (Greenleaf Evidence, sec. 564, *n*.) If the decree was deemed erroneous an appeal could have been taken. If not taken, the statute expressly decided the decree was final and conclusive. (Bigelow Estoppel, 94.)

This case, as brought in the District Court, was exactly the case brought before the Judge of the Superior Court in 1828. The evidence introduced was exactly the same. The facts as to the time of the grant were the same. Can the petitioners, under this late amendment, destroy the force of the former adjudication by proceeding upon a different theory? It is not at all similar to a case where a plaintiff in ejectment sues to recover land and fails, upon a title which he then had, and then sues upon a subsequently acquired title. Nor are these petitioners in the condition of those claimants who continuously asserted a title which had been declared invalid but which by legislation was subsequently permitted to be established. If they had claimed under a grant of February 20, 1818,

and that title had been, as it must have been, decided invalid by the 8th article of the treaty, a statute might validate that grant and permit them to recover, and the former adjudication would not be a bar. But that is not this case.

It is no answer to this contention to say that the original grantors did not have the *registro* in their possession and could not, therefore, have made the changes. If these were not made actually by them, or at their instigation, they were with their knowledge and acquiescence. They were immediately furnished with the exemplification and order for possession. These showed the true dates. A grant of February 20, 1818, was not annulled until the signing of the treaty, February 22, 1819. When that fact became certain, or, if you please, the necessity for the alteration became imminent, the dates were completely changed and a grant of February, if such existed, was destroyed.

III.

The Act of June 22, 1860, as Extended by the Act of June 10, 1872, Does not Authorize the Confirmation of a Grant of Lands in Florida, East of the Perdido River, Made After the 24th of January, 1818.

The amendment declaring upon a grant of February 20, 1818, and the contention of counsel are based upon the hypothesis that some rights have been created on behalf of claimants by the act of 1860 which could not otherwise have existed.

In *Scull* v. *United States* (98 U. S., 410), Mr. Justice Miller said:

> The history of the relation of the Government of the United States to the claims for lands asserted under rights derived from the Spanish and French Governments, prior to the cession of Louisiana and Florida to our Government, as it is found in the treaties, the acts of Congress, and the judicial decisions of the American tribunals, is given very fully and with accuracy in the opinion of this court in the case of *The United States* v. *Lynde* (11 Wall., 632), and will be referred to now without repeating it. The necessity and the policy of the act of 1860 (12 Stat. L., 85) are there fully considered.

As the last resting place of these petitioners, and of any others in like situation, is upon this act of 1860, it is appropriate and necessary to refer to the judicial determination of the scope of that act.

In Lynde's case (*supra*), Mr. Justice Bradley, delivering the opinion, gives a historical statement of the events which led to the passage of the act.

> Louisiana, as possessed by the French, prior to 1763, embraced not only the entire territory west of the Mississippi, but also extended east of that river, along the Gulf of Mexico, as far as the Perdido, the present boundary between Alabama and Florida. By the treaties of 1763 France ceded the latter portion, lying east of the Mississippi, except the city and island of New Orleans, to Great Britain, and the residue to Spain.

Subsequently (in 1783) Spain acquired the part ceded to Great Britain, and thus became possessed of the entire territory on our western and southern borders. On the 1st of October, 1800, a secret treaty was made at St. Ildefonso, between Spain and Bonaparte, then first consul, by which Spain agreed, on certain conditions to be performed, to retrocede to the French Republic "the colony or province of Louisiana with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it ought to be after the Treaties subsequently entered into between Spain and other States."

The ambiguity of this last expression was the cause of the subsequent misunderstanding between Spain and the United States. Did it mean that Spain was to retrocede to France all the territory which the latter had formerly possessed under the name of Louisiana, or only so much as remained after the separation of West Florida therefrom, and the cession thereof to Great Britain? The United States contended the former, Spain the latter.

The importance of this question arose from the fact that the cession of Louisiana by Bonaparte to the United States included in precise terms what had been retroceded by Spain to France. The treaty of April 30, 1803, after reciting the exact language of the treaty of St. Ildefonso, describing the colony or province of Louisiana, as above stated, ceded "the said territory, with all its

rights and appurtenances, as fully and in the same manner as they had been acquired by the French Republic in virtue of the above-mentioned treaty with His Catholic Majesty." In accordance with her construction of the treaty of St. Ildefonso, Spain refused to surrender possession of the territory east of the Mississippi and Iberville rivers which she had acquired from Great Britain, and which the English had named West Florida, and she retained possession of it and exercised full sovereignty over it for many years afterwards.

Notwithstanding this refusal of Spain to deliver up West Florida, the United States, thru the executive and legislative departments of the Government, always claimed that it was covered by the two Treaties of Cession, and insisted that it rightfully belonged to them, tho no demonstrations were made to dispossess the Spanish authorities until 1810, when President Madison issued a proclamation directing that possession should be taken, but at the same time declared that the right thereto should remain, as it had continued, a subject for amicable negotiation with the Spanish Government. Possession was taken by the United States accordingly.

During the period that Spain remained in possession, her authorities continued to grant lands, not only in small parcels to actual settlers, under her colonization laws, but in large tracts to speculators and favorites.

> From 1803 to 1806, inclusive, the Spanish Intendant, Morales, made many such grants (of which the grant in question was one) and which have ever since been the subject of much litigation and dispute, never being recognized as valid by our authorities, unless so recognized by the act of 1860, hereafter referred to.

The opinion then refers to the act of March 26, 1804, creating the Territory of Orleans and the District of Louisiana, by the fourteenth section of which all grants of land within the ceded territories the title whereof was at the date of the treaty of St. Ildefonso (October 1, 1800) in the Crown, Government, or nation of Spain, are declared void, except *bona fide* grants made to actual settlers prior to December 20, 1803, etc. That was the day on which the commissioner of France delivered to the commissioners of the United States formal possession of the province of Louisiana. This act extended to West Florida (so-called) as well as to Louisiana, and as a part thereof.

The opinion then cites the proclamation of President Madison, in 1810, in which it is declared that this territory eastward of the Mississippi and extending to the Perdido had at all times been claimed and considered as being within the colony of Louisiana conveyed by the treaty of Paris of 1803; and Governor Claiborne, governor of the Orleans Territory, was ordered to take possession of the same.

Then the act of April 25, 1812, is referred to, whereby commissioners were appointed to investigate all the titles and claims to lands in that territory; and also the opinion of the commissioners that the territory was a part of Louisiana, ceded to the United States in 1803, and that the authority of Spain over the same had ceased by the treaty of St. Ildefonso.

The retrospect then brought into consideration the eighth article of the treaty between the United States and Spain of February 22, 1819. It was said: "When this treaty came before the courts it was held that it furnished no aid to the disputed claims, since it only guaranteed grants made by the King of Spain in the territory ceded by that Treaty; and the territory ceded only embraced such territory as belonged to the King of Spain; and, as the United States held that the disputed territory did not belong to him, no grants made by him therein were confirmed by the treaty." The cases *Foster* v. *Neilson* (2 Pet., 253), *Arredondo* v. *United States* (6 Pet., 691), and *United States* v. *Percheman* (7 Pet., 51) were reviewed and cited as establishing this principle.

The learned justice then goes on to examine the action of Congress in "attempts to secure the recognition of these Spanish grants." The act of June 17, 1844, extended the provisions of the act of May 26, 1824, relating to land titles in Missouri, to Louisiana and Arkansas, and the district between the Mississippi and Perdido rivers, and the district

courts were invested with jurisdiction over land claims originating with either French, Spanish, or British authorities (5 Stat. L., 676). This act authorized any person claiming land by virtue of any French or Spanish grant, concession, warrant or order of survey legally made or issued before the 10th of March, 1804, which was protected or secured by the treaty with France of April 30, 1803, and which might have been perfected into a complete title had not the sovereignty been changed to present a case to the district court, etc.

Cases were brought and rejected upon the ground that the act related to inchoate and imperfect titles, and was intended to give a means of completing them.

> The court reaffirmed *Foster* v. *Neilson*, and held that Spain could not make any valid grant in the disputed territory after the treaty of St. Ildefonso, and that the act of March 26, 1804, which had never been repealed, had pronounced all such grants void. The court adhered to the same views in *United States* v. *D'Auterive* (10 How., 609); *United States* v. *Phila. and New Orleans* (11 How., 609); *Montault* v. *United States* (12 How., 47); *United States* v. *Castant* (12 How., 437); and a number of other cases in the same term, including the case now before the court. Thesecases were decided in 1852.
>
> In view of this long course of decisions, all to the same purport, it must be considered as judicially settled in this court that Louisiana, as ceded to the United States in 1803,

> embraced the territory between the Mississippi and Perdido rivers, and that our Government had a perfect legal right, whatever may have been its moral or honorary obligations, to ignore all grants made by the Spanish authorities after the treaty of St. Ildefonso went into effect. It must also be regarded as judicially settled that the treaty of 1819 confirmed grants of lands made in the Floridas, east of the Perdido, but not those made to the west of that river unless made to actual settlers or made before the treaty of St. Ildefonso went into effect. If the Political departments of the Government felt bound, from considerations of honor and good faith, or from motives of conciliation and policy, to give effect to any other grants, it was for them to do so.

The claim of Lynde's heirs was for lands east of the Mississippi but west of the Perdido and which were a part of the disputed territory. This claim of Forbes's heirs is for lands east of the Perdido and therefore not in the disputed territory. This difference becomes material when we come to consider the purpose and the policy of the act of 1860. Because, as Mr. Justice Bradley said, in this same case (p. 644):

> After the unsuccessful attempt made in the courts, as last referred to, under the Missouri act of 1824, the subject was again brought to the attention of Congress in May, 1858. Mr. Benjamin, who had been counsel for the claimant in the last cases, made a

> report to the Senate as chairman of the Committee on Private Land Claims, and submitted a bill for the relief of the claimants. This report contained a very full history of the treaties and litigation, giving a favorable view of the Spanish side of the question. Suffice it to say, in consequence of this report, Congress passed the act of June 22, 1860.

This report is Senate Report No. 279, Thirty-fifth Congress, first session, vol. 2, 1857–58.

Regarding the above expression of the court, and especially the relation, if any, of this legislation to the eighth article of the treaty of 1818, an examination of the report and of the records of the negotiations leading up to the treaty becomes important. (*Binns* v. *United States*, 194 U. S., 486, 495.)

It is not to be presumed that all the conclusions arrived at by the committee were incorporated in the act. The declaration that even if the United States had the right to the disputed territory, grants made therein by the sovereign in possession were valid and conveyed a valid title to the grantee was not affirmed. On the contrary, what was provided for and assented to was confirmation, not recognition.

After an elaborate statement and argument, which, after all, was an appeal to the honor of the Government to acknowledge a moral obligation, the committee urged that the claims before them were protected by the faith of the treaty of

1819. It must be kept in mind that these claims were in the disputed territory and were all upon grants, concessions, or warrants of survey made prior to January 24, 1818. By the second article of the treaty "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of east and west Florida."

The eighth article was the subject of much controversy, which was not closed until February 22, 1819. The following statement of the preliminary negotiations to the acceptance of this article is taken from the abstract in the report and from the original documents in American State Papers. The conduct of the affairs, commenced at Madrid, was removed to Washington. The negotiations had been long interrupted by complications growing out of the Indian troubles and the invasion of Florida by General Jackson, but were renewed in 1818 between John Quincy Adams, the American Secretary of State, and the Chevalier de Onis, the Spanish minister. Mr. Adams made, January 16, 1818, these propositions for a settlement of all outstanding difficulties with Spain, including not only the eastern boundary but the western boundary of Louisiana, and the claims of our citizens to indemnity for spoliations:

1. Spain to cede all her claims to territory eastward of the Mississippi.

2 and 3. * * *

4. * * * *No grants of land subsequent to the 11th August, 1802, to be valid.* (3 Am. State Papers, For. Rel., 464.)

On the 24th January, 1818, the Spanish minister answered: "Nor can I omit to declare to you, sir, that the pretension of annulling the grants of lands in Florida since August, 1802, would be *in opposition to all the principles of justice.* These grants are made in a lawful manner," etc.

Mr. Adams was put on his guard by a letter from Mr. Erving, our minister, dated at Madrid on the 10th February, 1818: "The King has lately made large grants of land in east Florida to several of his favorites, and I am credibly informed that within these few days he has, by a sweeping grant, given all the remainder to the Duke of Alagon, captain of his guards, and the Count of Punon Rostro, one of his chamberlains. This is, perhaps, his mode of preparing for a *cheap* cession of the territory to the United States." (3 For. Rel., 509.)

On the 26th April, 1818, he again writes, that in reference to a cession of Florida, in compensation of American claims, he had told the Spanish minister that these claims would have to be paid out of the sale of the lands.

"Now, the King had lately given all those lands away (as I had duly informed my Government); to complete the transaction it would, therefore, be absolutely necessary that the whole of those grants should be canceled." And on the 14th May, 1818,

he announces "the council sent orders to the Duke of Alagon and the Count of Punon Rostro, directing them not to make sales of the lands granted to them." (3 For. Rel., pp. 511–512.)

On the 18th July, 1818, Mr. Erving says to Mr. Pizarro, the Spanish secretary of state, "that it is quite certain that the United States can not receive Florida as indemnity for its reclamations, *if all the cessions to individuals since the date of the convention* (1802) are not annulled." (3 For. Rel., p. 516.)

Finally, the following were the propositions of the negotiators who concluded the treaty in Washington. The Chevalier Onis proposed, on 24th October, 1818, this clause:

"His Catholic Majesty, * * * to put an end to the differences which now exist between the two Governments, cedes to them (the United States), in full property and sovereignty, the provinces of East and West Florida, with all their towns and forts. * * * *the donation or sales of* lands made by the Government of His Majesty, or by legal authorities, until this time, are nevertheless to be recognized as valid." (3 For. Rel., p. 530.)

Mr. Adams answers, 31st October, 1818: "Neither can the United States recognize as valid all the grants of land until this time. * * * It is well known to you, sir, that notice has been given by the minister of the United States in Spain to your Government that *all the grants of land lately*

alleged to have been made by your Government within those territories must be canceled, unless your Government should provide some other adequate fund from which the claims above referred to of the United States and their citizens may be satisfied."

Mr. Adams then proposes "that all grants of land in any part of the territories to be ceded by Spain to the United States subsequent to the year 1802 are to be held null and void" (p. 531).

Don Onis replies, 16th November, 1818: "To this modification, in its absolute sense, I can not assent, inasmuch as it is offensive to the dignity and imprescriptible rights of the Crown of Spain, which, as the legitimate owner of *both the Floridas*, had a right to dispose of those lands as it pleased; and further, as the said modification would be productive of incalculable injury to the *bona fide* possessors who have acquired, settled, and improved those tracts of land.

"*The extent of what I can agree to is* that the *late* grants made by His Majesty in the Floridas, *since the 24th January last*, the date of my first note announcing His Majesty's willingness to cede them to the United States, shall be declared null and void." * * * (p. 532).

Mr. Onis then submitted a draft of an article and Mr. Adams a counter draft, the article being No. 9 in the project of a treaty by Mr. Onis, and No. 8 in the counter project of Mr. Adams.

Mr. Onis. Article 9.

All the grants of lands made by His Catholic Majesty, or by his legitimate authority, in the aforesaid two territories of Florida, and others which His Majesty cedes to the United States, shall be confirmed and acknowledged as valid, excepting those grants which may have been made after the 24th January of last year, the date that the first proposals were made for the cession of these provinces, which shall be held null, in consideration of the grantees not having complied with the conditions of the cession.

Mr. Adams. Article 8.

All grants of land made by or in the name of His Catholic Majesty in the aforesaid territories, after the 24th January, 1818, shall be null, the conditions of the said grants not having been performed by the grantees. *All* grants made *before that date* by His Catholic Majesty, or by his legitimate authorities in the said territories, *the conditions of which shall have been performed by the grantees, according to the tenor of the respective grants*, and *none other*, shall be confirmed and acknowledged as valid.

When Mr. Adams's counter-projét appeared, the Chevalier Onis said on this article that it could not be varied from what was contained in his projét, as the object of the last clause therein is merely to save the honor and dignity of the sovereignty of his Catholic Majesty; and on this objection Mr. Adams agreed to the Chevalier's proposal with the following explanation: "That all the grants of land which shall not be annulled by this convention are valid to the same extent as they are binding on his Catholic Majesty." (3 For. Rel., 619, 620, 621.)

By comparing these different projéts, the words in italics in the counter-projét of Mr. Adams, and finally the words just quoted, the whole purpose of the clause is apparent. The United States were guarding themselves from any admission of the validity of such enormous *colonization* grants as were usually made by Spain, on condition of settlement and cultivation, of which they had recently been warned in the examples of the grants to the Duke of Alagon and Count of Punon Rostro. There was no danger as regarded *bona fide* sales or grants to settlers. Hence the requirement of Mr. Adams to insert words authorizing the United States to avail themselves of a noncompliance with conditions by grantees; hence his insertion of the provision that the titles should have the *same* validity against the United States as against Spain.

Before the ratification of the treaty, the United States, however, required of Spain a special acknowledgment of the nullity of the three principal grants made subsequent to the date indicated in the treaty, and it was accordingly ratified on the 24th October, 1820, with a special declaration that the three grants made in favor of Alagon, Punon Rostro, and Vargas were not ratified by the treaty. Now, the grant to Vargas was of land *west of the Perdido River, in the disputed territory*, and the inference is irresistible that, in the opinion of the Government, the title of Vargas would have been ratified by the treaty, unless excepted by special provision.

Mr. De Onis being at this time confined by indisposition, at his request Mr. Hyde de Neuville, the French minister, whose good offices were appreciated by both Governments, had a personal interview with Mr. Adams on February 15, at which there was a full and free discussion of the projet and counter-projet. Immediately after this interview, Mr. De Neuville prepared a paper in which are noted the objections of Mr. De Onis to parts of the counter-projet, the replies to those objections by the Secretary of State, and the points to which both parties were agreed. The differences were speedily and in a cordial spirit settled (4 For. Rel., 621, 622). On the 22d of February the treaty was signed. The eighth article, as agreed upon, is as follows:

> All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty. But the owners in possession of such lands, who, by reason of the recent circumstanes of the Spanish nation and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants shall complete them within the terms limited in the same, respectively, from the date of this

> treaty; in default of which the said grants shall be null and void. All grants made since the said 24th of January, 1818, when the first proposal, on the part of His Catholic Majesty, for the cession of the Floridas was made, are hereby declared and agreed to be null and void.

It was subsequently determined by the Supreme Court that the words "shall be ratified and confirmed" in this article must be understood as expressing "shall remain ratified and confirmed," so that the words should be the same in confirming as in annulling grants. (*United States* v. *Arredondo*, 6 Pet., 741; *United States* v. *Percheman*, 7 Pet., 50, 88.)

This court has repeatedly had occasion to construe the terms of the 8th article before and in connection with statutes for the adjustment and settlement of private land claims in Florida. It may be generally remarked that these statutes all recognized the binding force of the treaty, both as confirming and annulling grants. It was enacted in them that titles to be ascertained should be "dated previous to the 24th of January, 1818;" "land embraced by the treaty between Spain and the United States of the 22d of February, 1819;" "no judge shall take cognizance of any claim annulled by the said treaty." But these statutes referred only to lands east of the Perdido. The territory west of that river was held by another title. The contention that grants in that coun-

try were confirmed by the 8th article was held unfounded. They were subject to disabilities exprest in the act of 1804.

In *Foster and Elam* v. *Neilson* (2 Pet., 253), Mr. Chief Justice Marshall, speaking of the eighth article, said:

> The insertion of these words (which belong to him—in the second article) materially affects the construction of the article. They can not be rejected as surplusage. They have a plain meaning, and that meaning can be no other than to limit the extent of the cession. We can not say, that they were inserted carelessly or unadvisedly, and must understand them according to their obvious import.
>
> It is not improbable, that terms were selected, which might not compromise the dignity of either Government, and which each might understand, consistently with its former pretensions. But if a court of the United States would have been bound, under the state of things existing at the signature of the treaty, to consider the territory then composing a part of the State of Louisiana, as rightfully belonging to the United States, it would be difficult to construe this article into an admission that it belonged rightfully to his Catholic majesty.
>
> * * *
>
> A part of West Florida lay east of the Perdido, and to that the right of his Catholic Majesty was acknowledged. There was, then, an ample subject on which the

words of the cession might operate, without discarding those which limit its general expressions.

In *Garcia* v. *Lee* (12 Pet., 511, 520) this court said:

> The case of *Foster* v. *Neilson* decides this case. It decides, that the territory in which this land was situated belonged to the United States at the time that this grant was made by the Spanish authority; it decides that this grant is not embraced by the eighth article of the treaty which ceded the Floridas to the United States; that the stipulations in that article are confined to the territory which belonged to Spain at the time of the cession, according to the American construction of the treaty; and that the exception of the three grants made in the ratification of this treaty by the King of Spain, can not enlarge the meaning of the words used in the eighth article; and can not, in the language of the court, "extend them to embrace grants not otherwise intended to be confirmed;" or grants "which it (the American Government) has proclaimed to be void, as being for lands within the American territory." These principles, thus settled by this court, cover the whole ground now in controversy.

Keeping in view, then, the history of the negotiations which resulted in the incorporation of the eighth article in the treaty, these statutes past for the adjustment of land titles in Florida, and these judicial decisions, how can the conclusion be

reached that it was the intention of the act of 1860 to annul that article? And these petitioners can not recover upon the grant recently set up unless that article is abrogated. The treaty affirmed and declared null and void all grants with reference to the date of January 24. The lands embraced in the annulled grants were absolutely ceded to the United States by the second article. There is no such language of designation in the treaties of St. Ildefonso and the treaty of Paris of 1803. Even the limits of Louisiana and Florida were not determined. "The name of Florida (says Marbois, p. 284) could not have been inserted in the treaty (of 1803) without preparing great difficulties for the future." The obscurity in the language, which Napoleon welcomed, was the cause of much dispute and litigation arising from uncertainties of titles. Many statutes were past in efforts to settle these troubles and adjust titles in the disputed territory upon just and equitable principles. (Mar. 26, 1804, 2 Stat. L., 283; Mar. 2, 1805, 2 Stat. L., 324; Mar. 23, 1807, 2 Stat. L., 440; Apr. 23, 1812, 2 Stat. L., 713; Mar. 3, 1819, 3 Stat. L., 528; June 17, 1844, 5 Stat. L., 676.)

At last, these statutes not having accomplished what petitioners had persistently sought, and not having afforded that equitable right to which they asserted they were entitled, Congress, in its bounty, past the act of 1860. Notwithstanding the initiative of the act, it is not contended that enforceable

claims are confined to those in the disputed territory—the territory between the Mississippi and the Perdido. Such were the claims of the original memorialists upon which the Senate committee made the report, thru Mr. Benjamin, which was the basis of the act. But afterwards others were included. The act as framed was intended to give the benefit of this relief to any persons having claims resting upon the same or similar circumstances; and further, by a comprehensive extension, "to provide for the *final* adjustment of private land claims in the States of Florida, Louisiana, and Missouri." It is significant that the parts of Mississippi and Alabama, which had been taken from the territory of West Florida (so called), upon the admission of those States into the Union, and which were in the disputed territory, were not embraced in the act. So also as to Arkansas, in which so many Spanish grants had been given. It is more than probable that the representatives of these States feared the effect of efforts to disturb titles which had been substantially settled under previous legislation.

Contemplating all these things, is it not beyond cavil or quibble that this act was past in sequence of the acts we have referred to and in furtherance of a policy which was always within the same expressly limited lines? Broad as is the language, in permitting the Government to be sued; in permitting facts heretofore found to be accepted; in permitting, if judgment goes for

petitioners and the Government had parted with the title to the lands, scrip to be issued locatable upon any public lands, it is respectfully submitted there was no intention on the part of Congress to change or affect any of the stipulations or exceptions of the treaty of 1819.

The first article of the act provides:

> That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant, concession, order of survey, permission to settle, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated * * *

are authorized to apply to commissioners, under the terms mentioned, for confirmation of their titles.

The eleventh section, under which this action is brought, provides that in case of such a claim as mentioned in the first section, where the lands have not been in possession and cultivated for twenty years "and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claim-

ants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances, by the competent authority, *prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such territory*," the claimants might proceed in the District Court.

The question primarily arises, What is the character of claim intended to be sustained by this act? It is only reasonable to conclude that this claim must rest upon some right, not necessarily legal, but at least equitable, which imposes an honorable or moral obligation upon the present Government to recognize it. It must not be an illusory or unfounded claim. It must be of a substantial character and analogous to those rights which are protected by the laws and practises of civilized nations.

The language used shows this: "Bearing date prior to the cession of the territory, *or* where such title was created and perfected during the period while the foreign governments claimed sovereignty over or had the actual possession of the territory." This latter clause, undoubtedly, had reference to complete titles in the disputed territory. It comprehends the acts of a *de facto* in contradistinction and antagonism to a *de jure* government. It would

not be proper for the political branch of this Government to speak of Spain in the Floridas east of the Perdido, prior to the cession, as *claiming* sovereignty and having *actual* possession. She had sovereignty and possession, notorious and undisputed. The Government was both *de facto* and *de jure*, a Government existing and acknowledged thruout the world.

The words, "prior to the cession to the United States of the territory," when applied to the confirmation of titles to lands ceded by the treaty of 1819, under the American construction, must allude to that object of the act, "for the *final* adjustment of private land claims in Florida." The purpose was to confirm, not to create, titles. The suit provided for was "substantially an action of ejectment, with the bar of the statute of limitations removed, the United States having a constructive possession for the defendant." (*Scull* v. *United States*, 8 Otto, 410.) The act was the last of a series *in pari materia*. It must be construed with the others and with reference to the treaty. Had there been any intention to affect the article annulling grants, Congress would have said so in unmistakable language. (Cherokee Tobacco, 11 Wall., 616.) So radical a departure from all the past policy of the Government would not have been left to an implication which, in its results, might be doubtful and uncertain. All the acts have been in observance of the treaty stipulations.

It has been said that perfect grants, made before the treaty became effective, were not annulled by the eighth article. It is asserted that vested rights of property were evidenced by the grant, that it was not intended to divest these rights by the contracting parties, and that it was not in the power of the King of Spain or of the United States to do so, if either had so intended. No rights of property in these petitioners are involved, as far as the United States are concerned. At the time of the ratification of the treaty and the delivery of possession Forbes & Co. had no rights of property in these lands. (*Ely* v. *United States*, 171 U. S., 220, 239; *United States* v. *Green*, 185 U. S., 256, 269.) Until that time the territory was in the possession and in the absolute authority of the King of Spain. He had previously annulled the Forbes grant. Under the laws of Spain he had this right and power. (*United States* v. *Arredondo*, 6 Pet., 691, 714.)

This question has been before this court. (*Doe* v. *Braden*, 16 Pet., 656.) The only grants we know of coming within the annulment of the eighth article, other than this one set up in petitioner's amendment, are the grants made to the Duke of Alagon, the Count of Punon Rostro, and Don Pedro de Vargas. These grants, made in February and April, 1818, were royal grants, made by the King himself, and stand, as far as the treaty is concerned, upon the same footing as a grant of February 18, 1818. (*Foster and Elam* v. *Neilson*,

supra.) Since the signing of the treaty and its ratification, no grant bearing date after the 24th of January, 1818, has ever been heard of or known to exist in Congress or in the courts.

The case last cited was an action of ejectment to recover lands in east Florida. The plaintiff claimed title under the grant to the Duke of Alagon. A reason given for the stipulation in the ratification was that the Duke intended to rely upon a royal order of December 17, 1817, as being sufficient to convey the land, altho the grant was on February 6, 1818. Upon the relation of the declaration in the ratification to the annulment in the article and the force of the annulment the court said:

> For it is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. * * *
>
> In this case the King of Spain has by the treaty stipulated that the grant to the Duke of Alagon, previously made by him, had been and remained annulled, and that neither the Duke of Alagon nor any person claiming under him could avail himself of

this grant. It was for the President and Senate to determine whether the King, by the constitution and laws of Spain, was authorized to make this stipulation and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to, and governed by their laws. And as the treaty is by the Constitution the supreme law, and that law declared it public domain when it came into the possession of the United States, the courts of justice are bound so to regard it and treat it, and can not sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported unless he can maintain that a court of justice may inquire whether the President and Senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned any act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the Constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly no judicial tribunal in the United

States ever claimed it, or supposed it possessed it.

The plaintiff seems to suppose that he has a stronger title than that of the Duke of Alagon. It is alleged that the Duke of Alagon, on the 29th of May, 1819, conveyed the greater part of the land granted to him by the King of Spain to Richard S. Hackley, a citizen of the United States. This deed to Hackley was after the signature of the treaty and before the exchange of ratifications, and the plaintiff claims thru Hackley, and contends that this American citizenship protected his title.

But if the deed from the Duke of Alagon to a citizen of the United States was valid by the laws of Spain, and vested the Spanish title in Hackley; yet the land in his hands remained subject to the Spanish law and the authority and power of the Spanish Government as fully as if it had continued the property of the original grantee. Hackley derived no title from the United States, nor were his rights in the land, if he had any, regulated by the laws of the United States, nor under their protection. It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the Government might lawfully exercise over it, depended altogether upon the laws of Spain, and whatever rights

> he may have had under the deed or the Duke of Alagon, they were extinguished by the government from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights in it. (*Doe, ex dem. Clark, et al.* v. *Braden*, *16 How., 656–659.*)

If the grant to Forbes & Co. can be confirmed by virtue of broad provisions in this act, why not the three specified grants? By what process are you going to split up and discriminate equal stipulations? Besides this, the lands described in the Forbes grant of February 20, 1818, are included in the grant to Punon Nostro of February 6, 1818 (Clark's Land Laws, 68–71). Without stopping to remark that the Captain-General of Cuba could not grant lands in the name of the King, which had previously been granted by the King himself, we may ask by what hocus-pocus of statutory construction can it be held that, under this act, the grant to Forbes may be confirmed but the three grants can not be? Yet none ever contended or ever will contend that the intention of the statutes was to confirm the latter.

In the leading case of *Lynde's heirs* v. *United States* (*supra*) Mr. Justice Bradley refers to these and kindred matters, and sums up as follows:

> We can not avoid the conclusion, therefore, that the Act of June 22, 1860, was in-

> tended to validate all grants which were made by the Spanish Government to *bona fide* grantees of lands in the disputed territory whilst the Government remained in possession of the territory and claimed sovereignty over it, subject, of course, to the express exceptions of the treaty of 1819, and the supplementary declaration of the King of Spain, finally annexed thereto.

That case was for lands in the disputed territory. For how much stronger reason should these exceptions be maintained in the territory ceded by that treaty. The express exceptions embraced two kinds of grants—(1) those made under certain conditions which had not been or would not be complied with within the time mentioned in the article; (2) those made since the 24th day of January, 1818.

The next case in which this act came before the court was *McMicken* v. *United States* (97 U. S., 204). The court again, thru Mr. Justice Bradley, said:

> We do not understand that the act of 1860 was intended to make any claims valid which would not have been so before, if the government making the grant had had the right to make it. The objection of want of title in the granting power was removed by the act as to all grants made by a government in possession, which were otherwise sustainable on the principles of justice and equity; the time for presenting claims was opened and extended, and actual surveys were dispensed with where the land could be otherwise

> identified. These were the principal remedial provisions of the act, so far as relates to the validity of titles. Claims invalid from intrinsic defects in 1815 or 1825 are not helped by the act of 1860. The utmost that our treaty stipulations ever required was that we should sustain titles which would have been sustained by the government from which our title to the territory was derived. Nothing more could be fairly asked, and we think that nothing more was intended by Congress to be given, except to make provision (as it did from time to time) in favor of actual settlers.

This case of McMicken was decided upon the point that no title was granted; nothing but a permit to inhabit and cultivate as preliminary to a grant; and no attempt was ever made to fulfil the conditions nor any plausible excuse given for their nonfulfillment. But it is of value in showing the view taken of the statute and its object. Said the court:

> But as it seems to be thought that every semblance of title or concession, however stale, and without regard to conditions of whatever kind, has been revived and validated by the act of 1860, we have preferred to review the original grounds upon which the policy of the United States Government with regard to these Spanish and other grants was based and to show what that policy really was.

On the same day was decided the case of *United States* v. *Watkins* (97 U. S., 219). The opinion was delivered by the same justice, who said:

> This case is very different from the preceding (McMicken), being based upon a complete and perfect title, bearing date the 5th of March, 1804. This title consists of a Spanish grant, made by the intendant Morales to one Charles Ramos, for 20,000 arpents of land, situated in the St. Helena portion of Baton Rouge district, on the Amite River, and described by certain metes and bounds, according to a survey thereof which had been previously regularly made. The grant was made in pursuance of a sale of the land; and altho made according to the views of our Government after the title of Spain had ceased to exist, yet it was made while that Government had actual possession of the country and claimed the sovereignty thereof; and, therefore, it is within the purview of the act of 1860 (12 Stat. L., 85), and comes clearly within the case of *United States* v. *Lynde* (11 Wall., 632).

Scull v. *United States* (*supra*) was an appeal from the decree of the district court for the western district of Missouri. The suit was brought under the act of 1860, for a large tract of land, claimed by virtue of a grant by Baron de Carondelet, Spanish governor of Louisiana, December 22, 1793. The claim was rejected "for want of any actual

survey at the time the grant was made, or at any other time, by the Spanish Government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession, or order of survey, by which the land can be surveyed and identified." The court, by Mr. Justice Miller, cited and emphasized its previous decisions.

United States v. *Clamorgan* (101 U. S., 822) and *D'Auterive* v. *United States* (101 U. S., 700) were suits brought under this act, in which the previous decisions were sustained, and the claims in both cases were rejected because of uncertainty of location and vagueness of description and want of legal survey.

United States v. *De Morant* (123 U. S., 335) was a petition filed under the eleventh section of the act of 1860 for two parcels of land, northwest of Pensacola, granted by Don Jose Masot, governor of West Florida, one on the 8th day of October, 1817, and the other on the 20th day of January, 1818. In 1824 these Spanish titles were presented to the commissioners appointed under the act of May 8, 1822, for ascertaining claims and titles to land within the district of West Florida. They were rejected for the reasons reported, that no evidence was given of cultivation, as required, and that the claims had not emanated from His Catholic Majesty or his lawful authorities in West

Florida prior to January 24, 1818, or that the order of survey had not been actually anterior to that period. (American State Papers, Public Lands, Vol. IV, p. 199.) The dates of the surveys show they were both made after the 24th day of January, 1818, but, as the court said, "the grants were made before that period." And, in speaking of the provisions of the eighth article of the treaty, the court said:

> The commissioners construed these provisions of the treaty as *invalidating grants made prior to the date named*, if the surveys were not completed until after that date. This construction was opposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the act of 1860, under which the present proceedings were instituted, made the date of cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. * * *
>
> The act of 1860 was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different boards of commissioners, and by the courts, under the strict construction of the treaties, which prior laws had required. The history of the question is given at some length in the opinion of this court in the case of *United States* v. *Lynde*, and need not be repeated here.

Indeed, as far back as *United States* v. *The Heirs of Clarke and Atkinson*, 16 Pet., 228, this court said:

> By the eighth article of the Florida treaty no grants made after the 24th of January, 1818, were valid; nor could a survey be valid on lands other than those authorized by the grant; still, the power to survey in conformity to the concession existed up to the change of flags.

We have already seen that statutes were from time to time enacted for the adjustment of land claims within the States of Missouri and Arkansas, and in Louisiana and so much of the States of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude and between the Mississippi and Perdido rivers. We have seen that these statutes were ineffective in many cases, because they related to inchoate and incomplete titles, and were intended to give a means of completing them; and also that this court held that Spain could not make any valid grant to lands in the disputed territory after the treaty of St. Ildefonso. We have seen that the primary intention of the act of 1860 was to validate grants made by the Spanish Government to *bona fide* grantees of lands in the disputed territory, whilst the Government remained in possession of the territory and claimed sovereignty over it.

We have also seen that after the treaty of Wash-

ington of February 22, 1819, acts of Congress were past providing for the settlement and confirmation of private land claims in Florida. These acts were distinct and different from those which related to titles in the disputed territory. There was never any dispute that the country east of the Perdido was ceded by the treaty of 1819. There was never any question as to the fact or the right of possession. When Congress came to legislate on the subject of titles within that territory it always referred to the titles annulled by the treaty. These were not to be considered. And in all the efforts for legislation to settle the private land claims in east and west Florida no reference or allusion was ever made to the existence of grants thus declared to be null and void.

IV.

The petitioners are not within the provisions of the act of 1860.

By the eleventh section of the act the claimants may present their petition to the District Court, "unless such claim comes with the purview of the third section of this act."

The third section of the act provides:

> The claims so presented and past upon by the commissioners, as aforesaid, shall be by them divided in their report into three distinct classes, as follows, viz:

Number one shall contain all claims which, in their opinion, ought to be confirmed, where the

lands claimed have been in possession and cultivation by the private claimants or those under whom they derive title for a period of at least twenty years preceding the date of filing the claim, by virtue of some grant, concession, or order of survey, permission to settle, or other written evidence of title emanating from some foreign government which held or claimed sovereignty or jurisdiction over the territory in which the lands claimed are situated, and where the title emanating from such foreign government bears date anterior to the cession of said territory to the United States.

Number two shall contain all claims which, in their opinion, ought to be confirmed, where the lands are claimed under written evidence of title, as above provided in class *number one*, but where there has been no actual possession and cultivation of the land claimed for a period of at least twenty years prior to the filing of the claim.

Number three shall contain all claims which, in their opinion, ought to be rejected, whether from defect of proof, suspicion of fraud based on probable ground, uncertainty of location, vagueness of description, or any other cause sufficient, in their opinion, to justify such rejection:

Provided, That in no case shall such commissioners embrace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners or other public officers acting under authority

of Congress and rejected as being fraudulent or procured or maintained by fraudulent or improper means; nor shall any such claim be received or considered by the commissioners which has been already twice rejected on the merits by previous boards.

This proviso embraces the claims which are excluded from the jurisdiction of the court as coming within the purview of the third section. The claim of John Forbes & Co., set forth in the petition in this case, was examined by the judge of the Superior Court for the Western District of Florida and rejected as fraudulent. This grant is alleged to have been made by the Captain-General of Cuba and the Floridas on the 10th day of January, 1818. It was so reported to the Secretary of the Treasury, to be laid before Congress for their determination. The report was based upon an exemplification of the grant presented to and received by the commissioners. But, on the hearing before the judge of the Superior Court, the original or *registro* of the grant, obtained by General Call, the special commissary and agent of the Government, appointed for that purpose by President Jackson, was produced and received by the court. It was urged then that the case must be decided by the Spanish law in force when the grant was made; and that by that law the "registro" or original title paper could not be used in a court of law as evidence, and that the exemplified copy, furnished by the authorized official, of this registro, was the

only competent evidence of a grant authorized to be used in courts as evidence of the official action of the King of Spain or his lawful authorities.

These proceedings for the settlement and confirmation of land titles in Florida are under acts of Congress which prescribe the manner in which the questions are to be determined. Under the act of 1822 the commissioners were directed to examine and determine on the validity of patents, grants, concessions, and orders of survey agreeably to the laws and ordinances heretofore existing of the Government making the grants; but it was also directed they should have due regard in all Spanish claims to the conditions and stipulations contained in the eighth article of the treaty of February 22, 1819. By the act of 1828, under which the Territorial judge made his adjudications, it was declared that no claims should be received which had been reported by the commissioners as antedated or forged.

How could the commissioners report as to forgery or antedating if the exemplification was conclusive? It was by reference to the original document and memorandum, deposited in the official archives, that these facts could be established or refuted, because it must be the muniment of title forged or antedated to invalidate the grant. And by the act of 1824, which was incorporated in this act of 1828, the question of the validity of a title was to be settled and determined according to the law of nations, the stipulations of a treaty, the

laws and ordinances of the government from which it was derived, and the several acts of Congress in relation thereto, and all other questions properly arising between the claimants and the United States. These investigations, offered time and again thru long years to persons asserting rights derived from foreign powers, were to be conducted in perfect good faith to secure equity and justice to both the Government and the individual. It would be strange, indeed, if under such legislation, by the effect of a technical or arbitrary rule of evidence, titles were confirmed which could be shown to be absolutely null and void.

However, this claim was decided, in the manner stated, to be fraudulent. The judge reviewed the testimony and, with the grant before him, concluded it had been fraudulently altered and antedated to bring it within the term of the eighth article of the treaty.

It may be said that this decision was not by a public officer acting under authority of Congress. The proviso was framed evidently to cover every examination made by any authorized body. The various statutes appoint "commissioners," "registers and receivers," who are frequently called "boards of commissioners," and courts, or judges of courts. These latter are clothed with judicial powers and are the only officers who do not act in the capacity of commissioners. That they are public officers can not be disputed. The letter of the statute, then, embraces them.

It must be remembered that section 1 is much broader in its designation of the character of claims than section 11. The latter embraces only complete titles. The former embraces as well imperfect as perfect titles and without reference to the time of cultivation and possession. An option is given in the limited class of cases to apply to the district court. But that court must decide the claim valid or invalid "according to the principles of this act."

The principles of this act forbid the confirmation by the commissioners or the consideration by the court of any claim which had been rejected as fraudulent by anybody acting under authority of Congress, be it a commissioner, a board, a judge, or a court. Any other construction would render either tautological or unreasonable the words "other public officer." Indeed, where the same result was arrived at, it would be to say that it was intended the conclusion reached by a board, which had no higher power than to report to Congress, was of greater significance and credit than the adjudication of a court.

The matter was then submitted to the judge of the district court under the act of 1828, a hearing and trial had upon the merits, and the claim absolutely rejected because it was fraudulent.

The authority which was granted to the Commissioners to reject any claim from suspicion of fraud based on probable cause, or any other cause

sufficient, in their opinion, to justify such rejection, was a principle established in the act which was extended to the district court. During the time of the negotiations, in which was considered the matter of the confirmation and annullment of grants, it was understood and conceded on all hands that any grant or evidence of title then issued by the King of Spain or his authorities would be in bad faith and a fraud upon the contracting parties. (Am. St. Pap. IV, For. Rel., pp. 532, 618, 620, 627, 652, 653, 656, 662.) The chief reason for the long delay in ratification of the treaty by the King of Spain was a diplomatic quarrel as to the grants confirmed and annulled by the eighth article, principally directed to the three great grants. But it was not confined to them. Mr. Forsyth, our minister, in a note to the Duke of San Fernando and Quiroga, dated October 10, 1819, said:

> I am directed by the President to make known to His Catholic Majesty that the ratification by Spain will be received as valid on the precise and express condition that the grants of lands in the Floridas, made to the Duke of Alagon, the Count of Punon Rostro, and Mr. Vargas, and, in like manner, *any others which shall have been made under similar circumstances*, shall, in conformity with the eighth article of the said convention or treaty, be null and void, and shall never be admitted by the United States. (IV For. Rel., 666, 667.)

It is curious to notice that, while the moving consideration for the Forbes grant was the payment of an indemnity, the Captain-General deemed it necessary to state, as another motive, that the grantee, "by taking possession of (the land), will be able to benefit the province and bring colonists to establish themselves in it, rendering fruitful for the benefit of the State what now is desert and sterile." Whether for purposes of alienation or colonization the grant was equally objectionable.

It was not a sale for cultivation as were the grants in the disputed territory. It was liable to all the objections made to the three grants. The presumption is entirely fair that it was not known to the negotiators, and that it was not seriously regarded, until long afterwards it was forged and antedated to bring it within the lists of confirmed grants. And so it was not alluded to during the negotiations. But for condemnation and rejection it stands upon the same grounds as the others.

The decree in the District court was for a confirmation to the petitioners of a grant of February 20, 1818. The District judge, before whom the case was tried, delivered no opinion. The statute provides that upon appeal, the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeal thereto in chancery, and as equity and justice and the principles aforesaid may require. The United States, therefore, submits the

reasons stated herein, why the grant, whether it be claimed as a grant of the 10th of January or the 20th of February, 1818, should be rejected.

HENRY M. HOYT,
Solicitor-General.

ROBERT A. HOWARD,
Special Assistant Attorney.

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No. 69.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF OF APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,
v.
THEODORE DALCOUR ET AL., HEIRS OF John Forbes, deceased, et al. } No. 69.

REPLY BRIEF OF APPELLANT.

To the three briefs filed by appellees the appellant, by leave of the court, presents this reply:

I.

JURISDICTION.

(*a*) The appeal was taken under the *mandatory* provisions of the act of 1860, section 11: "If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States." In the case of claimants, from an adverse decision, an appeal *may* be taken.

(*b*) This is a case against the United States, brought under an act conferring special jurisdiction in a class of cases for the *final* adjustment of private land claims in certain territories.

It has been decided time and again that the right of the Court of Claims to entertain jurisdiction of cases in which the United States is defendant and to render judgment against the defendant is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed.

And this regulation by Congress extends to the entire procedure, including the right and the manner of appeals. So when concurrent jurisdiction was given to the District and Circuit Courts of the United States to entertain suits against the Government by the act of March 3, 1882, this court decided that the right and manner of appeal from those courts was the same as reserved in the Court of Claims act, but that the right of appeal to the Supreme Court in the instance of any judgment adverse to the United States can be exercised by the United States in any case of the prosecution of a claim in these courts. (*United States* v. *Davis*, 131 U. S., 36, 39.)

So by the act of March 3, 1891 (the same date as the Circuit Court of Appeals act), to establish a court of private land claims in certain States and Territories, an appeal to the Supreme Court is provided for. In *United States* v. *Coe* (155 U. S., 76,) altho the question whether the appeal should be to the Circuit Court of Appeals or to the Supreme Court did not arise, it was expressly decided that under the statutory provision the direct appeal would lie.

And this reasoning seems to have been recognized in *Re Hohorst* (150 U. S., 653, 661), where Mr. Justice Gray, speaking of original jurisdiction conferred by the act of August 13, 1888, c. 866, says: "The grant to the Circuit Courts of the United States in this section of jurisdiction over a class of cases described generally as 'arising under the Constitution and laws of the United States' does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class."

Always the policy has been that these special cases should go straight from the District Court to the Supreme Court (sec. 9, act of May 26, 1824, 4 Stat. L., 52; sec. 7, act of May 23, 1828, 4 Stat. L., 284). The reason of this policy is manifest, viz, so that there should be a prompt and conclusive decision, by the highest tribunal, of questions involving the law of nations, the declarations of treaties, and the principles of equity and justice, as well as peculiar considerations of national honor.

This reason and such policy in this special peculiar line of cases has certainly survived the Circuit Court of Appeals act, although there has been no legislative occasion for reannouncing them since the act of 1860. The fact that the question of the right of direct appeal, under these circumstances, has never been presented to this court supports our view.

It is submitted respectfully that *Gwin* v. *United States* (184 U. S., 669), can be clearly distinguished

from the present case. There the appeal granted directly to the Supreme Court from the District Court by the act of 1851 was taken away by the act of 1864, except as to cases where an appeal had already been taken and an appeal allowed from the District to the Circuit Court. By the Circuit Court of Appeals act all appellate jurisdiction was taken away from the existing Circuit Courts, and it was specifically enacted that no appeal should be taken from the District to the Circuit Courts.

Mr. Justice Brown, delivering the opinion of the court, did say:

> As this case does not fall within any of classes excepted by sec. 5, it is clear that if any appeal will lie at all, it should have been taken to the Circuit Court of Appeals, and that we have no jurisdiction to enforce the execution of this decree by appeal from the district court.

But he also said, page 674:

> It is clear that, so far as concerns appeals from final decrees, they must be taken under laws then in existence, and to the court provided by such laws. To say that a decree rendered in 1900 may be appealed to a court whose jurisdiction to review it was taken away in 1864 is beyond belief. Even if the Court of Appeals act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the Circuit Court of the United States for California.

And that was the matter decided.

(*c*) But even if the Circuit Court of Appeals act applies, the construction of the treaty is really and substantially drawn in question in this case. The petitioners asserted their right as dependent on the treaty in the original petition and in the amendment of 1878 by reference to the original petition. The United States in the fifth paragraph of the answer (p. 70) relied upon the treaty. The petitioners sought to show by testimony taken after the answer that the grant was good as of January 10, 1818, still relying, of course, upon Article VIII of the treaty, and not until the final amendment of May, 1904, did they repudiate the treaty and rely solely on the act of 1860.

Pretermitting for the present the compelling clause for appeal in the statute of 1860, it may be doubted if any other than the direct appeal would lie. *American Sugar Refining Co.* v. *New Orleans* (181 U. S., 277, 281). And we would undoubtedly have been met with this objection if we had gone to the Circuit Court of Appeals.

The rule, tersely laid down in *Muse* v. *Arlington Hotel Co.* (168 U. S., 431) is not disputed. In that case "the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and not on the ground that the case 'arose under the Constitution or laws of the United States or treaties made or which shall be made under their authority.'" "In respect of plaintiffs' case, as stated in their complaint, the Circuit Court decided no question as to the application or construction

of the Constitution or the validity or construction of the treaty." The writ of error, sued out directly to the Circuit Court, was dismissed.

In *Filhiol* v. *Maurice* (185 U. S., 108), growing out of the same facts as stated in the above case of *Muse* v. *Arlington Hotel Company*, the jurisdiction was not invoked on the ground of diverse citizenship, but on the ground that the case arose "under the Constitution or laws of the United States or treaties made or which shall be made under their authority;" and this appeared from plaintiff's statement. This court said (p. 110): "As the Circuit Court took jurisdiction, which could only have been on the latter ground, and decided the case upon the merits, the writ of error was properly taken directly to this court, the jurisdiction of which is exclusive in such cases."

Now what is the record in the case at bar? After stating the claim the petitioners say (Tr. p. 13):

> With such facts as we have presented we claim that the eighth article of the cession binds the U. S. to confirm the title of John Forbes to those lands of which we had possession under a title to all respects perfected at the date of the treaty. That the fact that the U. S. pointed out specifically the land titles in Florida, which were objected to and canceled by Spain of itself waives all objection to others. (In the treaty they canceled those claims and so confirmed the others.

Upon these statements the District Court took jurisdiction under the act of 1860. We are not to be understood as claiming that this jurisdiction was vested alone upon a case arising under the treaty as provided for in the statutes of general jurisdiction to the Circuit Courts. We are speaking with reference to the contention of counsel that the provision of the act of 1860 for direct appeal has been impliedly repealed, and that, if there is an appeal at all in these cases it must lie to the Circuit Court of Appeals.

The matter is not at all of original but of appellate jurisdiction, and we are mindful of the distinctions. The direct appellate jurisdiction from the District and Circuit Courts is "in any case in which the constitutionality of any law of the the United States, or the validity or construction of any treaty made under its authority, is drawn in question." The confirmation of grants under the treaty of 1819 could be only of grants prior to January 24, 1818. If complete grants in Florida, those could undoubtedly be confirmed under the eleventh section of the act of 1860 for the final adjustment of private land claims. This could be inquired into under the petition in this case.

The answer of the United States denies the grant as set up and expressly states that the evidence relied on were exemplifications of forged papers, altered so as to bring them within the terms of the

treaty. All the evidence introduced by petitioners subsequently was to support a grant confirmed by the treaty.

Finally, at the hearing they asked leave of the court to make the amendment that the grant upon which they rely was made on February 20, 1818. Waiving here for the sake of the argument all other disputes, the answer to this was a denial that any such grant was made and an allegation that if it was made as alleged, it was made after the 24th of January, 1818, and declared and agreed to be null and void under the treaty.

There was no evidence introduced by petitioners in support of this latter claim. They relied solely upon the exhibition of the *registro* brought by defendants as a part of the record in the former case to show an altered and forged paper. Had the *registro* been introduced to prove the issue on the part of petitioners it would have been objected to, and the obligation would have been imposed upon claimants to account for the erasures and alterations. As it now stands in a court of equity it is a paper forged to bring it within the terms of the treaty, upon which claimants had, until the last day of the controversy, relied.

The extraordinary contention is now set up that the validity and construction of the treaty is not drawn in question. The case of *Mitchell* v. *Furman* (180 U. S., 402) is applicable to this case. There the petitioners claimed on a grant which they asserted was confirmed by the treaty of 1819.

That case was brought in the Circuit Court upon a grant claimed to have been confirmed by the treaty with Spain, and that the controversy necessarily involved the construction of the treaty. This court said, page 428:

> The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the Circuit Court, and to justify an appeal from its decree directly to this court.

Here the contention is much stronger. The jurisdiction of the District Court is unchallenged. The pleadings, evidence, and decree show beyond reasonable doubt that the validity and construction were in question. It is contended, however, that by this late amendment the consideration even of the treaty is avoided.

They can not thus thrust the treaty question out of the case as a real and substantial issue when and because it suits them to do so. They can not, after experimenting with their original and antagonistic theory, take a grant which we offered as an original, to show that it was not a good grant of the earlier date because it was not a good grant at all, and rely upon it as a good grant of a later date under a new theory and thereby oust the jurisdiction of this court. But even so, and even now in the totally irreconcilable aspect which they seek to give to the case, this court must construe the treaty. Petitioners may choose to abandon the treaty,

but they can not eject it from the case they have made. This court in considering and determining the effect of the treaty on the act of 1860 and of the act upon the treaty must deal with the validity of the treaty, not perhaps its validity in general as an established historic contract of the United States, but the validity and meaning of Article VIII and Article II.

The court must apply the treaty, and in applying the treaty to this case and to the act, in considering whether the act abrogated the treaty and let in grants later than January 24, 1818, the court must construe the treaty as well as the act. Petitioners' concession now that they do not claim under the treaty, can not concede away the court's peculiar and broad jurisdiction over all treaty questions.

The learned counsel say they could proceed without any treaty. How? The very lands were acquired by the United States only by the treaty of cession. What was ceded and what not ceded was determined by the treaty. What might be considered as claims growing out of grants from a former sovereign had to be considered with reference to the treaty. What titles could be confirmed had to be determined by reference to the terms, the ratification, the taking effect of the treaty.

In short, it was pleaded and urged by the defendant that if there had ever been a grant to Forbes, of February 20, it was annulled by the

treaty. The annullment was the act of the King of Spain. The United States received these lands freed from any right or claim, legal or equitable, of Forbes. The alleged grant had been destroyed and the treaty so declared. This is denied by the petitioners. And yet it is strangely contended the construction of the treaty is not drawn in question.

Another indication that the construction of the treaty is drawn in question is this: The petitioners argue that they have a vested right which was good against Spain; that, being a vested right, based upon valuable consideration, a mere variation in date is immaterial, the grant being identical, the same grant, in fact, in all other respects; and that, as such, the beneficial intent and effect of the act of 1860 operates upon the grant and revives it or recreates it notwithstanding the bar of the treaty limitation of time.

Upon this contention two observations are to be made: First, the grant was not good against Spain. Plainly Spain annulled it by Article VIII of the treaty—annulled it by anticipation in the negotiations and by relation back when the treaty was signed and then successively ratified by the two powers. Second, the variation in date is material. It is not like the difference between February 7 and 11 in the Texas case cited (page 55 of their main brief). Between the two dates here a date of vital significance was interposed, changing all previous relations, and that makes the variation of date a crucially material fact. (*United States* v.

Galbraith, 2 Black, 394; and see *Wood* v. *Steele*, 6 Wall., 80.)

Counsel think their case is not touched by *United States* v. *Galbraith*, because, they say, there the whole grant was *fabricated* when the authorities had no power, and antedated so as to appear to have been made when they had the power. That is a distinction without a difference, because here the grant was *made* when the authorities had no power, and was antedated with the same motive and purpose as in the Galbraith case.

It is always to be remembered that the foundation of any claim they have under the act of 1860 is because the lands were acquired (sec. 11) "prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign Government from which it emanated claimed sovereignty over or had the actual possession of such territory." What was the cession here? The treaty, of course, was the cession. When was the cession? During what period did the foreign government claim sovereignty or have actual possession; when the treaty was signed, or when it was ratified by Spain, or when it was ratified by the United States and ratifications exchanged? The answer to these questions is tolerably clear; but whether clear or not, the mere putting of the inquiries shows that the construction of the treaty is really and necessarily drawn in question in the present case.

II.

THE STATUTES OF LIMITATION.

As to the amendment of 1878 adding the heirs of James and John Innerarity, we reiterate the contention that this set up a new cause of action barred by the statute, by pointing out that Mr. Hatfield's "Brief of the Heirs of John Forbes, appellees," reveals the divergence of interest between the Forbes and Innerarity representatives. This divergence is by no means veiled by the supposed community of interest (e. g., pp. 2, 5, 6, 7, 41, 42, 53, 54 of said brief).

That this antagonism between the Forbes and Innerarity interests thus shown is a real factor in the case and points unerringly to the condemnation of the amendment of 1878 as introducing a new cause of action is conclusively established by the "Additional Brief for Appellees," which devotes three pages (3–6) to opposition to Mr. Hatfield's brief on the issue of variance between the petitioners.

III.

As to the amendment of 1904, the proper time to make it was after the answer of the United States setting up the treaty bar and the adjudication of Judge Brackenridge. Instead of amending, then, they speculated with testimony for the regularity of the grant as of January 10, 1818, and concluding that this was hopeless, faced about

squarely with an amendment which was their last substantial pleading in the case. Did not this change come too late? Is the new declaration not a material and fatal variance? Can they avail of a document which we pleaded and produced for one purpose, viz, to show that a grant of January 10 was impossible because there was no valid grant at all, in order to maintain that document as a valid grant of February 20?

III

THE TREATY, THE STATUTES, THE MERITS.

Always such cases are to be decided according to the law of nations, the laws and the stipulations of any treaty of the respective powers (e. g., sec. 2, act of 1824, 4 Stat., at p. 53), "the principles of justice and equity" (McMicken *v.* United States, 97 U. S., at pp. 208–209), and "the principles established by this act" (sec. 11, act of 1860). The principles of justice and equity certainly required the rejection of any claim antedated or forged, whenever that vice appeared, and whether so reported by Commissioners (who might not be informed, as in this case) or not. (See sec. 6, act of 1828, 4 Stat., at p. 285.)

Without dwelling on the earlier and general guides of adjudication, what are the principles of the act of 1860? Surely a court adjudicating under section 11 must regard the principles of the proviso to section 3, which means substantially that a claim previously rejected by an authorized tribunal as fraudulent shall not be confirmed; nor one twice

rejected on the merits by previous boards. In effect the last exclusion has operated here. The commissioners of 1824 plainly disapproved of this claim; the Congress of that time did not confirm it, which is tantamount to rejection. The Territorial court of 1830 rejected it.

But whether twice rejected or not within the meaning of that proviso, it was certainly rejected as fraudulent, because of the alterations, by Judge Brackenridge, whose opinion is before the court and speaks for itself. Judge Brackenridge adjudged this grant in 1830 on a petition which claimed that the grant was "actually guaranteed by the eighth article of the treaty." He did so under laws which necessarily discredited claims antedated or forged and claims annulled by the treaty (sec. 6, act of 1828), and which gave the court "full power and authority to hear and determine *all questions* arising in said cause relative to the title of the claimants" (act of 1824, 4 Stat., at p. 53).

He "refused and rejected" the claim on grounds going to the "validity of the record itself, which is the foundation of the claim;" that is, because "the public instrument * * * is null and void." The grant was not guaranteed by the treaty (in his view) because it was wholly and fundamentally invalid under the law by reason of the alterations. It was not a valid grant before January 24, 1818, because it was not valid at all.

Our opponents say that Judge Brackenridge

exceeded his jurisdiction; that he possessed no power beyond the authority to determine that the grant was not made before January 24, 1818. This is not so under the strictest and most technical construction, as the grant of jurisdiction, *supra*, shows. But that argument is merely adroit. It is a mere feat of dialectic and formal logic.

Their argument amounts to this—it is true that Judge Brackenridge rejected this grant as valid under the treaty because it was not valid at all. But there is no force in his decree now beyond the treaty scope; we do not claim under the treaty. Therefore the question is open, under the act of 1860, whether the grant is valid as of February 26, 1818, and the Brackenridge decision must be altogether ignored as a prior determination of *this* case. But Judge Brackenridge deliberately adjudged this very grant under ample authority, and, no appeal having been taken, that result was final. Both sets of heirs were brought into that case; both are seeking to enter this; the document is the same, the very grant itself.

By such analysis of the previous adjudication it is seen that the doctrine of estoppel reaches this claim. The logical dexterity of counsel reforms and then annihilates the decree of 1830 and creates a new and antagonistic right by virtue of the act of 1860. But when we scrutinize and reflect, it is perceived that the authorities which they cite (main opposing brief, pp. 76, 77) as excluding their case from the operation of estoppel, on the

contrary, perfectly characterize and comprehend it. The simple test is whether the suit of 1830 was not in fact a suit (ending in a decree) between the same parties about the same property, wherein the whole right and all possible rights were litigated. The act of 1860 gave no new right. A claim not good in 1825 because of intrinsic defects is not good under the act of 1860 (McMicken case, as quoted below). The act of 1860 gave in general another chance to present claims; it certainly did not intend to hold for naught prior complete adjudications.

If this case is not dismissed, because by the amendments new causes of action were introduced which are barred, then not only the same grant but the very same case in all substantial respects was conclusively decided by Judge Brackenridge.

Suppose the petitioners in the case of 1830 had appealed to this court and this court had affirmed the decree of Judge Brackenridge, would the petitioners be here now, or if they would, would not the court regard the present issue as *res adjudicata*? Is the determination of Judge Brackenridge any less conclusive as the case stands, since there was no appeal from his decree?

To support the argument against the comprehensive jurisdiction in the Territorial court, the petitioners cite *United States* v. *Baca* (184 U. S., 653). But that case simply decided that grants specifically confirmed by acts of Congress and followed by patents regularly issued were outside the

jurisdiction of the Court of Private Land Claims as defined by the act creating that court. The Court of Private Land Claims held that it was without jurisdiction to decree and confirm the land to the petitioners or to order a survey for that purpose, and yet undertook to adjudge that a perfect title in fee had vested by the Spanish grant in the grantees and remained in them and their successors. This court held that the manifest intent of Congress in the act creating the court below was that with any land of the right to which Congress in the exercise of its discretion had itself assumed the decision, the Court of Private Land Claims should have nothing to do; and that, for this plain reason, the merits could not be decided either by the court below or this court on appeal. That case is altogether different from this. Instead of any such restriction on the authority of Judge Brackenridge, he was empowered to, and did, adjudicate this case completely, as we have seen.

But Judge Brackenridge was right on the merits. He was right about the Spanish law. The petitioners have abandoned their contention (for which they adduced evidence) as to the *salvado*. They admit February 20 as the real date. They glance back to their former notion on that point by the argument that under the Spanish law not the original but the alterations state the true instrument. But this is only as to *commercial* transactions—that is to say, our understanding is that the Spanish rule referred to establishes alterations

in preference to the original writing only in relation to ordinary commercial transactions and mere negotiable instruments; that where in such cases the mitigation of the strict rule as to alterations and *salvados* is applicable, intent must be shown and *bona fides*, and the rule is never relaxed as to more solemn instruments under seal.

The rule is laid down in 1 White, New Recopilacion, 298, quoting the Spanish authorities: "From the third axiom it follows: * * * 3d. That the copy taken from a protocol spoiled or faulty (*viciado*), or wanting solemnities is null, *Pareja*, tit. 1, res. 3, sec. 1, *á* n. 42, *al* 45. * * * 6th. That the escribanos must not alter (*romper*) the protocol, although they may copy (*saquen*) the instruments in public form, Ll. 12 and 13, tit. 25, lib. 4, Rec. (Ll. 6 and 1, tit. 23, lib. 10, Nov. Rec.)"

It must be remembered, however, that by this suggestion the petitioners are merely seeking to excuse and explain the alterations; they are not claiming on the alterations; they are claiming on the grant and date as originally written, namely, February 20, 1818.

But their argument on this point is wholly inconsistent and must be ignored. On pages 81 and 82 of their main brief they rely on the Spanish law as holding that "the alterations will be * * * null and void," and say that the *registro* is intact as if no alterations had been made; and then (pp. 86–88) they argue that the alterations

are regular and valid and properly ratified under a *salvado*, by which they inevitably go back again to a grant of January 10. It is difficult to see how they can successfully escape one horn or the other of the dilemma. If the alterations are good and the grant regular, as of the altered date, which they thus suggest even now, then they have definitely abandoned that claim on the face of their final pleading, the amendment of 1904. If the alterations are null, as they also contend, then they stand on an antedated grant of February 20, and must fail before the treaty stipulation or else must convince the court that the act excludes the treaty and the antedating is an innocent and not a fatal thing. In short, they say in substance, "Probably the court ought to accept the unexplained alteration as regular and official, for in that form only the Spanish authorities solemnly certified this document several times; but if not, then the court ought to say that the alteration is to be wholly ignored, the grant saved under the act of 1860, notwithstanding the treaty, and that the instrument is fair and valid without a trace of fraud or forgery." Surely these are too many alternatives, and the petitioners have astonishing and antagonistic propositions to maintain.

Here the alterations certainly vitiate the grant. We do not need to look back to old conceptions of the common law relieving or charging a party in respect to an alteration. Long ago he was charged,

however the alteration was made; the document itself was sacred. More recently he has been relieved, if his own fraud did not appear, but the exceptions are numerous and significant. A solemn instrument of grant has always been scrutinized by keen suspicion, and many deeds have been accounted as null if such grave doubts on their face have not been removed by proof thus called for from a proponent.

As to governmental grants, the presumptions are always in favor of the Government and the burdens against a grantee. (*Greenleaf Ev.*, secs. 564, 565; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 546; *Slidell* v. *Grandjean*, 111 U. S., 412, 437; *United States* v. *King*, 7 How., 833, 847; *United States* v. *Teschmaker*, 22 How., 392; *United States* v. *Knight's Admr.*, 1 Bl., 227, 251.)

Especially and peculiarly has a royal instrument of grant from Spain under the treaty of 1819 lain open to these rules. And Spain annulled this grant by the treaty.

Finally, there are two plain reasons why this point is not a matter to be determined by the fine distinctions of ancient or modern authorities in foreign law or our own: First, without respect to presumptions or burdens and altogether apart from motives or intent, the mere antedating in these cases of foreign grants has always lain under unqualified condemnation as contrary to the principles by which the adjudications are guided and contrary to the express language of the statutes

(e. g., section 6 of the act of 1828); second, because manifestly the strongest presumptions should run against an alteration which antedates, when the change attempts to place the instrument ahead of the total bar of an intervening date.

Grant the higher point of view as to fraud in this field laid down in the Arredondo case. It is certain that we can not now prove fraud in procuring or maintaining this grant. But it is equally certain that in disclaiming any intention to impugn present representatives, and in speculating as to reasons and motives for the alterations, the supposition of this Government, on the oral argument, that Spanish officials might have been responsible because of governmental motives of their own is no concession in this case. The alterations were made; they are highly suspicious; the house of Forbes had representatives in Cuba at the time; their interest is manifest; their original exemplification disappears; the United States (in the answer to the Innerarity suit of 1828–1830) called for the production of the supposed original title papers; and it is no violent or unworthy assumption to say that when the petitioners responded to this call by an application for a *subpena duces tecum* addrest to Mr. R. K. Call, they wilingly risked and speculated somewhat, even if James and John Innerarity knew that the Forbes grant was antedated. Surely it is no gratuitous and wholly unfounded suspicion to

suggest that the house of Forbes at the time elected to meet the Government challenge. Very likely they did not know; they trusted to the innumerable chances that fraud was not perpetrated or would not be revealed by the physical state of these ancient papers. They lost, and they accepted the result. The proof is that they did not appeal from the decision of Judge Brackenridge.

The general conviction that the act of 1860 was intended to apply only as well as primarily to the "disputed territory" is shown by the restriction of Mr. Justice Miller, perhaps unconsciously (*United States* v. *Clamorgan*, 101 U. S., at pp. 825–826), to the treaty with France of 1803. Laying that aside, however, because the act includes the State of Florida *eo nomine*, and because the Morant case was decided with reference to territory *east* of the Perdido (like the present case), let us consider that line of decisions. Surely the limitation in the McMicken case (97 U. S., at pp. 208–209) still applies as reinforcing the limitation in the Lynde case (11 Wall., at p. 647), which excepted cases barred by Article VIII of the treaty or void for fraud or any other vice apparent on the the face of the grant.

In the Lynde case Justice Bradley said (11 Wall., at pp. 646–647) that "the act of June 22, 1860, was intended to validate all grants which were made by the Spanish Government to *bona fide* grantees

of lands in the disputed territory whilst the Government remained in possession of the territory and claimed sovereignty over it, *subject, of course, to the express exceptions of the treaty of 1819* and the supplementary declaration of the King of Spain finally annexed thereto. * * * If it should appear that a grant was obtained by fraud *or was affected by any other special vice* it would be the duty of the tribunals to reject it."

Counsel suggest that this reservation of the Lynde case refers only to the three specifically annulled grants which were mentioned in the King of Spain's supplementary declaration appended to the treaty. But evidently not, or why use the conjunctive, "subject, of course, to the express exceptions of the treaty of 1819 *and* the supplementary declaration of the King of Spain annexed thereto." The treaty itself contained the "express exceptions" of Article VIII, but no specific annulments. The court in the Lynde case is speaking of lands in the disputed territory. If the exceptions were to govern there, where Spain's sovereignty and title had never been recognized, then *a fortiori* in the country east of the Perdido. Two of the three grants specifically annulled lay to the east of the Perdido; one, the De Vargas, was in the disputed territory. The treaty and the historic facts give no support to their argument, and the language of Mr. Justice Bradley can not thus be restricted and perverted. It is perfectly well

known that other grants than the three were meant to be annulled and were therefore within the "express exceptions of the treaty." The letter of Mr. Forsyth, quoted at page 75 of our brief, shows this as well as the dissenting opinion in the Arredondo case (6 Pet., at p. 755). The three grants were not excluded in the treaty by name, to save the honor of the King, and because "there were other grants of the same kind and made under similar circumstances. To have named them might have left room for a presumptive inference in favor of others. The determination was to exclude them too." This quotation from a dissenting opinion merely states the fact and challenges no opposite conclusion reached by the court.

In the McMicken case (97 U. S., at pp. 208–209) the same learned justice said:

> We do not understand that the act of 1860 was intended to make any claims valid which would not have been so before if the government making the grant had had the right to make it. The objection of want of title in the granting power was removed by the act as to all grants made by a government in possession which were otherwise sustainable on the principles of justice and equity; the time for presenting claims was opened and extended; and actual surveys were dispensed with where the land could be otherwise identified. These were the principal remedial provisions of the act so far as relates to the validity of titles. *Claims invalid from*

> *intrinsic defects in 1815 or 1825 are not helped by the act of 1860.* The utmost that our treaty stipulations ever required was that we should sustain titles which would have been sustained by the government from which our title to the territory was derived. Nothing more could be fairly asked, and we think that nothing more was intended by Congress to be given, except to make provision (as it did from time to time) in favor of actual settlers.

Did the court, speaking thru Mr. Justice Bradley, in the Morant case, intend to open the door to any cases other than those initiated before, but not completed by survey until after the date limited by the treaty? Did the court mean to say that a grant *after* January 24, 1818, was good? If it did, that is the first and only time the court has announced such view. And if it did, then we deferentially but earnestly contend that the *Morant* decision, if it was uncertain and inconclusive, must be revised and strictly and plainly limited to a case where a grant *before* was not *perfected* until *after* the treaty date, i. e., must exclude a grant not *made* (whenever initiated under an application) *by official action*, until after the treaty date.

The treaty limitation means something; it means *this* at least, notwithstanding the act of 1860. The argument of appellees is undoubtedly able as well as ingenious. But we submit with great confidence that such a grant, now nearly 90 years old,

stale and rejected, antedated and therefore forged, because it purports to be what it is not, can not be affirmed as valid by this court, under the treaty or under the act or under any principles of law, equity, or justice.

HENRY M. HOYT,
Solicitor-General.
ROBERT A. HOWARD,
Special Assistant Attorney.

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FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 69.

UNITED STATES, APPELLANT,
vs.
THEODORE DALCOUR, ET AL., THE HEIRS OF JOHN FORBES,
FANNIE W. J. INNERARITY ET AL., THE HEIRS OF JAMES INNERARITY,
VICTORIA INNERARITY, ET AL., THE HEIRS OF JOHN INNERARITY, APPELLEES.

Office Supreme Court, U. S.
FILED.
OCT 27 1906
JAMES H. McKENNEY,
CLERK.

Appealed from the District Court of the United States, in and for the Southern District of Florida.

Brief of WILLIAM W. DEWHURST, WILLIAM A. BLOUNT AND A. C. BLOUNT, JR., Attorneys for the Appellees.

H. S. White, Printer, Pensacola.

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Statement of Pleadings and Proceedings.

(The abbreviation "Tr" refers to printed transcript of record.

This is a suit brought under the provisions of the Act of June 22, 1860, (12 Stat. at Large, p. 86,) entitled "An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri and for other purposes" as extended by the Act of June 10, 1872, (17 Stat. at L. p. 378.)

Its purpose is to procure the confirmation of a Spanish

Grant of land in West Florida, alleged to have been made by Cienfuegos, Captain General of Cuba, on February 20, 1818, to John Forbes and Company, the firm consisting of John Forbes, James Innerarity and John Innerarity, each owning an undivided one-third.

The petition for confirmation (pp. 7-15, Tr.) was filed in the District Court of the Northern District of Florida on the 3rd day of March, 1875, by Theodore Dalcour, *et al.*, heirs of John Forbes.

The petition stated that the grant was made to John Forbes, but referred to and relied upon a copy of the grant proved before the Land Commissioners appointed by the Act of Congress, May 28, 1822, entitled "An Act for Ascertaining Claims and Titles to Lands Within the Territory of Florida," (3 Stat. at L. p. 709,) which copy is found at pp. 95, *et. seq*,, Vol 4, Am. St. Papers, and shows the grant to have been made to John Forbes and Company.

On December 14, 1878, with the permission of the District Judge, the parties to the above petition and the heirs of James Innerarity and John Innerarity, filed an amendment to the petition (pp. 15-17 Tr.) setting out that the allegation in the original petition that the grant was made to John Forbes was a mistake, and averring that it was made to the firm of John Forbes and Company, and that the partners of the firm were John Forbes, James Innerarity and John Innerarity, and each the owner of an undivided one-third, and it prayed the confirmation of the grant to all the petitioners.

On May 19, 1891, the papers in the cause were destroyed by a fire which burned the United States Court House in Jacksonville, Florida.

On July 23, 1894, there was passed the Act of Congress, entitled, "An Act to Change the Boundaries of the Judicial Districts of the State of Florida," (28 Stat. at L. p. 117,) which transferred the case to the Southern District of Florida.

On June 14, 1900, the attorneys for the petitioners presented (pp. 1-6 Tr.) a petition to the District Judge for re-establishment of the destroyed files and records in the case. After the taking of the testimony before the Court (pp. 22-47 Tr.) and an answer by the United States and a demurrer and replication to it by petitioners (p. 49, Tr.) the Court decreed the re-establishment. (pp. 52-54 Tr.)

On October 18, 1901, the petitioners filed, (pp. 57-59 Tr.), a paper styled a Bill of Revivor, praying in the alternative that the suit might be revived so as to admit as complainants, heirs of certain of the petitioners named in the original and amended petitions, or that the Court should order that the suit might be prosecuted by the survivors for the benefit of themselves and of the heirs of those deceased. The United States demurred to this (pp. 56-60 Tr.,) but the demurrer was overruled, (pp. 60-62 Tr.,) and an order made that the survivors from time to time of the petitioners might prosecute for the benefit of all the heirs concerned. Thereupon the United States filed a plea to the bill of Revivor (pp. 62-64 Tr.,) which upon motion (p. 65 Tr.) of the petitioners was stricken from the files. (p. 66 Tr.)

The United States then moved (p. 66 Tr.) to strike from the files the amendment to the petition filed December 14, 1878, which motion was denied. (p. 67 Tr.)

Following the permission of the Court, the United States on May 1, 1903, filed an answer (pp. 67-81 Tr.) to which petitioners filed a general replication on May 29, 1903. (p. 81 Tr.)

After a reference to a master to take the testimony, and his report to the Court, a final hearing was had. As a part of the testimony introduced by the United States, was an original grant from Cienfuegos to John Forbes and Company, identical in form and substance with the exemplified copy relied upon by the petitioners, except that the dates of certain proceedings, including the date of the decree of the Captain General in the original differed from the same proceedings in the exemplified copy relied upon by petitioners. It was evident that the dates upon the original had been altered, and that this exemplification had been taken from the original after its alteration. This being the situation, the petitioners prayed an amendment to the petition (p. 106, Tr.) stating their reliance on the grant shown by the proof of the United States. This amendment was allowed. The exemplified copy showed the date of the grant to have been January 10, 1818, and the original introduced and proved by the United States showed it to have been February 20, 1818.

The Court on December 5, 1904, made a final decree (pp. 107-109 Tr.) finding the grant valid and confirming

the title in the petitioners. Thereupon the United States moved that the amendment which had been allowed, but which had not been filed, should be filed *nunc pro tunc*, which motion was granted, and the United States filed an additional answer (p. 111 Tr.) to which the petitioners filed a general replication.

Testimony was subsequently taken by the master as to the number of acres of land in the territory included in the grant which had been sold to the United States and which remained unsold. Upon his report (p. 112 Tr.) to which the United States excepted (p. 115 Tr.) but which was confirmed (p. 118 Tr.) the Court made a decree fixing the number of acres of land in the grant disposed of by the United States at One Million, One Hundred and Ninety Thousand, Four Hundred and Ninety-five and 45-100 (1,190,495.45) and the number of acres undisposed of (excluding certain unsurveyed lands and uncompleted homesteads and unapproved swamp land selections) at Seventy-nine Thousand, Six Hundred and Eighty-one and 49-100 (79,681.49) acres, and decreed petitioners to be entitled to patents for these last mentioned lands and land script, under the Act of June 22, 1860, for the first mentioned number of acres.

ARGUMENT.

(Throughout this argument the numbers in brackets following U. S. Supreme Court citations refer to book and page of Lawyers Co-operative Publishing Company's Edition.)

This court is without Jurisdiction.

The appeal is direct from the District Court to this court.

While the act of June 22, 1860, under which this suit is brought, authorizes an appeal direct from the District Court, yet, it is clear that since the judiciary act of March 31, 1891, the appellate jurisdiction of this court is to be found only under the provisions of that act.

The Paquete Habana, 173 U. S. 685;
United States vs. Rider, 163 U. S. 132.

If there be any jurisdiction, then, it is to be found in the

5th paragraph of the 5th section of the act of March 31, 1891, as follows:

"Appeals * * may be taken from the district courts * * direct to the Supreme Court in the following cases * *.

5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

There can be no pretense that the constitutionality of any law of the United States is in this case drawn in question, but we infer from the 9th assignment of error (p. 133 Tr.) that the appellant contends that the validity or construction of the treaty of February 22, 1819, between Spain and the United States is in question,

A review of the record shows that neither the construction or validity of the treaty was involved below or is involved here.

In the original petition the claimant relied upon the act of 1860, (pp. 10 & 12 Tr.) but stated that the 8th article of the treaty protected the grant, the confirmation of which was sought and which was alleged to have been made on January 10, 1818, that is, within the time permitted by the treaty for the making of grants which were to be recognized by the United States.

The petitioners evidently did not know when the petition was filed that the date of the grant had been altered from the 20th of February, 1818, to January 10, 1818, and that the exemplification proved before the United States Land Commissioners of Florida, upon which the petition was founded, did not give the correct date.

The United States, however, pleaded the alteration, and alleged that the grant had been made on February 20, 1818, and proved this fact by introducing the original grant in evidence.

Thereupon, the petitioners asked for and obtained leave to amend the petition by adding thereto the words,

"That the grant (heretofore correctly described in this petition, except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818." (p. 106 Tr.)

Considering this amendment as made, the court decreed,

upon the claim of petitioners, that the grant was made on February 20, 1818. (p. 107, 108 Tr.)

It will thus be seen that not only was the decree not founded upon a claim of a right under the treaty of 1819, but upon a direct repudiation of the treaty, for the treaty annulled all the grants made after January 24, 1818, and the complainants deliberately and solemnly amended so as to show that the grant was made after that time, and, therefore, that no right could be claimed by them under that treaty.

This court has held, under the quoted provision of the act of March 31, 1891, that in order that this court may have jurisdiction, because the construction or validity of a treaty is in question,

(1) "a right, privilege or immunity *dependent* on the treaty

(2) must be so set up or claimed

(3) as to *require* the Circuit Court to pass on

(4) the question of *validity* or *construction* in disposing of the right asserted."

Muse vs. Arlington Hotel Co., 168 U. S. 431.

Applying the test of this case, there is no jurisdiction in this court, for

1. There is no right asserted by the petitioners *dependent* upon the treaty, but the right is entirely independent of and in fact inconsistent with the provisions of the treaty. The petitioners rely entirely on the provisions of the act of June 22, 1860, by which a right to have confirmation of the grant, though made after the dates fixed in the treaty, is conferred, and by which the policy of the United States, as indicated by the treaty, is entirely changed. (See our argument on this point under assignments of error 7 and 8.)

Even if the grant in fact had been made by Spain within the time limited in the treaty, its efficacy would not have *depended* upon the treaty within the rule mentioned, for it would have been protected without the treaty, and could not be said to be dependent upon it.

Muse vs. Arlington Hotel Co., 168 U. S. 436.

2. Not only do we now allege that we do not set up or claim any right under the treaty, but, as we have shown, we amended the petition so as not only to fail to make any reliance on the treaty but in fact, to negative such reliance.

Upon the issues thus made, the case was tried and the decision rendered, and of course there was no issue which could be made as to the construction or validity of the treaty.

3. This being true, the court below was not *required*, to pass on any question affecting the treaty, for it was eliminated by the pleadings as a ground for recovery by the petitioners.

Even if there had been an assertion of a right of protection under the treaty, there was also the question of the enforceability of the grant under the provisions of the act of 1860, and there is absolutely nothing to show that the court was required to pass on any question connected with the treaty, or that it did not rely entirely upon the act of 1860. On the contrary, that it did adjudicate the grant to be valid under the act of 1860, and not under the treaty, is incontrovertibly shown by the fact that it adjudicated it to be made at a date when the treaty would have made it null and void.

4. Nor, in disposing of the right asserted, could the court enter upon the question of *construction* or *validity* of the treaty. Under no contention raised by either side, could either of these questions come before the court.

No one has ever questioned the validity of the treaty, and assuredly neither of the parties to this controversy has ever done so. Nor is there any controversy between the parties as to the construction of the treaty. The utmost that the United States has contended is, that by the terms of the eighth article of the treaty, this grant, made after January 24, 1818, was null, but the petitioners freely admit this and hence there is no controversy between the parties and no question on the record as to such construction.

The United States did contend below that the 8th article of the treaty was applicable to this grant, because the act of 1860 did not apply to it, but it is evident that this contention does not involve the validity or construction of the treaty, but the validity and construction of the act of 1860.

It might also be said that the contention of the United States involved the *applicability* of the treaty to this grant, and hence, gave the court jurisdiction, because a question would then arise as to a right under the treaty. The statute, however, does not give the court jurisdiction, when the question of the *application* of the treaty is involved.

Congress has, in the cases of treaties, only permitted inquiry by this court by direct appeal into the question of construction or validity, and carefully distinguished them from cases arising as to the constitutionality, in which jurisdiction is given by the 4th paragraph of the 5th section of the act of 1891, when the construction or *application* is involved.

The treaty is not even in the chain of title under which the petitioners rely, for the grant does not depend for its efficacy upon the treaty, but upon the act of 1860. Without either the treaty or the act, the petitioners would have had a vested, perfected right by virtue of the grant itself, although it might have been unenforceable without legislation by Congress. Even if, however, it had been a part of the chain of title that would not have been sufficient to give the court jurisdiction, unless it directly and not incidentally, involved the construction of the treaty.

DeLamar's Nevada, etc. vs. Nesbitt, 177 U. S. 523.

The simple essential fact is that the treaty plays no part in the determination of the case. If there had never been any treaty, the rights of the petitioners would have been the same, and in the presence of the act of 1860, the existence of the treaty does not lessen or impair that right.

Even from the standpoint of the United States, the treaty is not more material. It is true that by it the United States acquired from Spain the land in question, (if not previously granted,) and it is true that the treaty annulled the grant in question, but it is also true that both these effects are conceded by everybody and that it requires no inquiry into either the validity or construction of it to determine the effects, and, therefore, there is nothing upon which to predicate the jurisdiction of this court

Of course the mere assertion of the United States of a contention on its part, which no one controverts and which did not enter into the decree below, can be no foundation for any jurisdiction of this court, for there must be a *bona fide* contention, the determination of which was necessary in the decision of the case. To change a little the application of the decisions of this court, there must be color for the assertion and the right must be substantially drawn in question.

New Orleans vs. Louisiana, 105 U. S. 336;
Iowa vs. Rood, 187 U. S. 92;
Sloan vs. United States, 193 U. S. 614.

First Assignment of Error.

This assignment of error (p. 132 Tr.) is as follows:

"The Court erred in making the decree of May 8, 1901, restoring to the files of the District Court papers claimed to be copies of the original files in this case." By this we understand that the assignment alleges error because of the Court's re-establishing the lost files and records.

The argument below was, and probably will be here, that the petition was uncertain and defective, that the evidence did not justify the Court in making the order and that the re-establishment should not have been made, because of the delay in applying for it. To this we answer:

1. The petition is not defective.
2. The discretion of the Court in re-establishing the papers and prceedings will not be reviewed by this Court. If it should be reviewed, however,
3. The evidence fully justified the making of the order; and
4. There was no delay which precluded the petitioners from securing the relief asked.

This Court will not review the order of the Court below re-establishing the lost files and records, and if it reviews, will not reverse.

1. The petition was not defective ,since it complied strictly with the Statutes (Sections 899-903 Rev. Stat. as Amended by Act of January 31. 1879, 20 Stat. at L. 277.)

It is only necessary to make the allegations prescribed by Section 900 of the Revised Statutes, and this was done.

2. The re-establishment was in the discretion of the Court below, and the order of re-establishment will not be reviewed.

Cook vs. Burnley, 11 Wall., 672-676.

But if reviewable, the order will be sustained, for,

3. The evidence fully justified the making of it.

All that was required was that the Court upon a hearing should be satisfied of the truth of the statements of the application, and if so satisfied, to make an order of re-establishment.

The Court perforce was satisfied of the truth of the

statements in the petition, because the United States did not deny them, (See its answer, p. 47 Tr.) and they therefore stood proved.

Hart's Executor vs. Smith, 20 Fla., p. 63

The United States having consented to be sued, is bound by the rules of pleadings, including that which holds what is not denied as admitted to be true.

The United States vs. Darrington, 146, U. S., 338 (36-100;)

Farrar *et. al.*, vs. U. S., 3 Peters, 459 (7-24.)

But if not admitted, it was amply proved by the very best evidence attainable, which was all that was necessary.

That there had been a suit was conclusively shown by the United States Records. (pp. 50-51 Tr.) They also show the general nature of the suit. (*Ibid.*) That the suit was still pending, if it had not been admitted by the United States, was conclusively to be presumed, there having been no evidence offered that it had been dismissed.

P. W. & B. R. R. Co. vs. Howard, 13 Howard, 307-332.

The records of the Solicitor of the Treasury and Mr. Janin's docket are corroborative upon this point. (p. 30 Tr.)

Upon the existence and accuracy of the copies of the originals sought to be re-established, the evidence was peculiarly strong.

There was no evidence adduced by the United States and the testimony of the petitioners was full and complete.

William McCabe, a member of the bar of this and the Florida Courts, of high standing in Canada and well-known in Florida, produced copies made by him of the burned files and gave a satisfactory and convincing account of the reasons which caused him to make and preserve these copies. (pp. 35-46.) The character, abilities, habits, early labors and handwriting of the witness, and the circumstances under which the copies were made were personally known to the District Judge.

The copies produced are on file in the District Court. Their very appearance is convincing as to their genuineness. They are wholly in the handwriting of Mr. McCabe. The language used and the facts set forth could never have been the product of imagination. If it were possible to suppose a willingness to fabricate such papers, it remains

true that when produced the witness must have expected that he would have been met by duplicates in possession of the Government.

The District Judge after a painstaking examination of witnesses in the presence of the District Attorney, by him subjected to cross examination, upon evidence taken down as given, the Judge interrogating the several witnesses, scrutinizing the manner of each on the stand, with the great advantage of personally seeing the intelligence, candor, accuracy and truthfulness of each, and deliberately weighing the testimony as spoken, and afterwards presented in writing, assisted by the critical analysis of the District Attorney, found and after mature deliberation and ample opportunity for rebutting testimony, announced himself satisfied that the copies in the handwriting of William McCabe and by him produced were genuine copies of the burned files of this case.

It is true that McCabe was an interested witness. That fact only affects the weight of his testimony. The corroborative facts which sustain him are conclusive. The petition signed by Steele by its peculiar style proves its genuineness. The order of Judge Settle reserving to the United States the benefit of the Statute of Limitations is proof that the copies speak the truth and the whole truth.

Proceedings to restore lost or burned records of Court are informal and the circumstances of each case govern the degree and character of proof required. Generally from the nature of the proceeding slight evidence, and that of the lowest grade has been held sufficient to maintain an application to restore. The following cited cases and text-writers sustain this rule.

McKean, C. J., in Morris Lessee vs. Vandreen, 1 Dall., 65;
Winn vs. Patterson, 9 Peters, 677;
Weatherhead's Lessee vs. Baskerville, 11 How., text, 360;
Burton vs. Driggs, 20 Wall., 125 (22-302;)
Renner vs. Bank, 9 Wheat., 581;
Ruggs vs. Tayloe, 9 Wheat., 483;
Rich vs. Rock Island, etc., 97 U. S., 694;
Inhabitants of Stockbridge vs. Inhabitants of W. Stockbridge, 12 Mass., 400;
Mobley vs. Walls, 98 N. C., 284;

Pruden vs. Alden, 34 Am. Dec., 51;
Jackson vs. Hammond, 1 Caines Rep., 496;
Tomlinson vs Funston, 1 Green, (Iowa) 544;
Lyons vs. Gregory, 3 H. & M., 237;
Cook vs. Wood, 1 McCord Rep., 139;
Green vs. Stevens, 2 Duv. (Ky.,) 420;
Jackson vs. Cullum, 2 Blackf. (Ind.,) 229;
U. S. vs. Britton, 2 Mason, 468;
Goetz vs. Kochler, 20 Ill. App., 233;
Harris vs. McRae's Admr., 4 Iredell, 81;
Keen vs. Jordan, 13 Fla., 335;
2 Phil. Ev., 351; (4 Am. Ed.) Note 376;
Comyns Dig., Evidence A., 3;
1 Green, Ev., Sec. 509.

Revised Statutes Sec. 773 and Instructions to U. S. Attorneys, etc., p. 125, Sec. 4, require that the United States be annually advised of the reasons for the delay which existed and the record shows (Page 50, the Letter of the Solicitor of Treasury to J. N. Stripling, Esq., District Attorney, dated Feb. 15, 1901,) that the Government was advised annually of the pendency and continuance of suit until the fire burned the Court House in A. D. 1891.

4. There was no delay which precluded the petitioners from securing the relief asked.

No delay would be a bar to re-establishment, because the Statute (Sec. 900 Rev. Stat.) does not so provide. The Congress evidently contemplated that any question of delay or laches should be raised otherwise than in this proceeding.

The answer of the United States suggests that the delay in the prosecution of the suit before the destruction of the records and the delay in instituting the proceedings for re-establishment after their destruction, should have prevented the re-establishment. It is difficult, however, to see how a delay in the prosecution prior to the destruction can affect the right to re-establish. There is nothing before the Court in these proceedings except the questions specified in the Statutes, *i. e.*, the existence, the loss and the accuracy of the copies. The Court cannot consider anything affecting the merits or the right to final relief. Moreover, there is no evidence before the Court of the progress of the proceedings, until the papers are re-established, for until that time, there are no records or files by which the Court can be informed of the progress or status of the case. Even if

delay in any case would bar a re-establishment, it would not do so unless it appear that by the delay some evidence pertinent to the re-establishment has existed and has been lost during the delay. There is no pretense of any such loss.

Nor could the delay affect the right, if it be explained so as to shut out any finding of negligence on the part of the petitioner. Here there can be no finding of negligence, because while the destruction of the records was known, the existence of any copies thereof and probably the existence of any information from which the contents of the lost records could be supplied, was not known, until shortly before the institution of the proceedings for re-establishment. The copies were in the hands of McCabe, but his interest had ceased, as we shall clearly show, because of the adverse decision in the Dow case (mentioned below,) and the parties to this suit did not know of his possession of the copies.

The following statement of the facts, showing the status of the parties before and after the destruction of the records, will show that there was no negligence on the part of the persons interested in this suit. These facts were established before the Court, both by testimony and by certified copies from the Dow case, and have been omitted from the printed record here because not necessary to be considered by this Court.

The petition was filed on the 3rd of March, A. D., 1875. The original petition was signed and verified by Alexander T. Steele, Esq , as Solicitor for the petitioners. The United States appeared and, as shown by the record still remaining in that Court, moved to dismiss the petition, because, as alleged, it was not properly verified. This motion appears on the motion docket of that Court, signed by John B. Stickney, attorney, dated May 5th, 1876. In A. D. 1878, the petitioners, by Judge Archer Cocke, as their Solicitor, asked leave to amend their petition, by making the descendants of Forbes' two partners, James and John Innerarity, parties. The amendment was allowed by order of Judge Settle and the amendment made.

Mr. Stickney was appointed District Attorney about 1876. Prior to his appointment he had been associated with William McCabe as counsel in the State Court on behalf of the heirs of the former partners of Forbes in the

original firm of Panton, Leslie and Company against the administrator of Forbes' estate, in which a decree was rendered May 20th, 1878, for over two million dollars. After his appointment as District Attorney, Mr. Stickney withdrew as counsel from the suit in the State Court, presumably because of his official duties in connection with the suit at bar. (Page 35 Tr.)

The title of the case in the State Court was Thomas Dow, *et. al.*, vs. Venancio Sanchez, Admr. of John Forbes. (23 Fla. 441.)

Soon after the rendition of the decree in the State Court, Mr. Edwin Janin, as counsel for petitioners, took charge of the litigation in both the Federal and State Courts. Recognizing that any recovery had in the suit at bar would inure to the plaintiffs in the suit in the State Court under their decree, Mr. Janin caused to be brought in the State Court a Bill of Review to set aside the decree rendered therein. Leave to file the Bill of Review was granted upon terms, a copy of which was read at the hearing before the District Judge and filed herein, (page 35 of Tr.) by which it appears that the claimants under John Forbes in the suit at bar were required to file in the District Court, in this suit, and in the State Court, a stipulation that they would not dispose of any recovery had in the suit at bar, nor attempt to encumber or part with the same, for ninety days after the final adjudication of the suit in the State Court. Petitioners in the suit at bar being widely scattered, many in number, including women and infants, it was manifestly impossible to comply with the order of the Court in the Dow case, and it became imperative, if anything was to be preserved to the heirs of Forbes to arrange a postponement of the trial of the case at bar for confirmation of the Grant, until on appeal there could be a reversal of the decree in the Dow case. This Mr. Janin seems to have arranged, as the annual reports made by the District Attorney to the Solicitor of the Treasury up to 1890 show that the case at bar was regularly "continued." The Dow case was appealed and in the latter part of 1887 the Supreme Court reversed the decree of the Circuit Court and dismissed the suit. See Sanchez, Administrator, etc. vs. Dow *et. al.*, 23 Fla., 445, read in evidence before the District Judge on the proceeding to restore the record, (p. 35 Tr.)

When by the reversal of the decree in the Dow case it

was again possible to proceed in the pending suit in the District Court for confirmation of the Grant, all the counsel in the case were dead except Mr. Janin and he was stricken with paralysis, from which he never recovered. His death occurred May 17, 1891. In May, 1891, the Court House at Jacksonville, with all the records and files in this suit, was burned.

It appears in evidence that about 1898 the widow of Mr. Janin learned that William McCabe, of Toronto, Canada, possessed valuable and necessary data relating to this suit. Mr. McCabe testified that in order to intervene in this suit he had made copies of the pleadings in the case, which he had preserved. The stipulation required to be made by the heirs of Forbes by the order in the Dow case shows that Mr. McCabe was depending on the recovery in the suit at bar to make good his decree in that case. Mr. McCabe testified that he refused to allow an inspection of his copies and he only produced them under process from the District Court. Whatever the motives that prompted him, the fact remains that these copies were long unknown to exist and when their existence was discovered were then inaccessible to the parties interested, until produced before the District Judge, A. D. 1900. There is no evidence that by any degree of diligence petitioners could have obtained earlier the information or the copies.

The delay was explained to the satisfaction of the District Court. Such part of the evidence as the personal knowledge possessed by the Judge of the several witnesses and of the local events cannot be brought before this Court. It appears on the record that of the numerous petitioners, many lived in foreign countries, that they ceased to be represented by counsel from the death of Mr. Janin, almost co-incident with the destruction of the records, until their present counsel was employed. There was no attempt to show that present counsel have not been diligent in instituting or carrying on the present proceedings, or that the delay was other than that enforced by circumstances.

Second Assignment of Error.

This assignment (p. 132) is as follows:

"II. The Court erred in over-ruling the demurrer to the Bill of Revivor herein."

This Court will not review the order of the Court below permitting the survivors to prosecute the cause for the benefit of all the heirs of John Forbes, James Innerarity and John Innerarity, and if it reviews will not reverse.

1. The making of the order was discretionary with the Court below and will not be reviewed by the Court.

2. The order did not affect the rights of the parties in anywise, for, as we shall show under assignment *four*, even without such an order the Court would have declared the title good, even though there was only one petitioner before it, and would have left the several co-owners to adjust their interests.

3. The demurrer was only to one branch of an alternative prayer and was, therefore, bad.

4. The making of the order permitting the survivors to prosecute for the benefit of all the heirs was in accordance with law.

5. The defense of the Statute of Limitations to this bill if permissible should have been by plea and not by demurrer.

6. The defense of the Statute of Limitations was not sustainable upon the facts stated in the bill and shown by the record.

1. The making of the order in question was discretionary with the Court below and not appellable. It was an amendment by petitioners defining the representative character of the petitioners, *i. e.*, adding new parties and orders permitting said amendments or in fact any amendments to pleadings are not subject to review by this Court.

Richmond vs. Isom, 121 U. S. 46.

2. We refer to the argument hereinafter made under assignment *four*.

3. The bill was in the alternative, containing a petition that the survivors be allowed to prosecute the suit to a decree for the benefit of all interested. It averred that from the nature of the act of June 22, 1860, the death of any one of the petitioners abated the suit only as to the person deceased, and that the surviving petitioners were competent to continue the suit to a decree. The prayer was that the surviving petitioners be directed to prosecute

the suit to a decree if the Court should determine that the nature of the case and the statute rendered them competent to call for its decree; otherwise, that the suit, in respect thereof abated, be revived. The demurrer was only to one branch of the alternative prayer and was properly overruled.

Western Ins. Co. vs. Eagle Fire Ins. Co., 1 Paige, 284;

Verplank vs. Caines, 1 John Ch. p. 57 and cases cited, p. 59;

F. S. Ry. Co. vs. Hill, 40 Fla., 1.

4. The making of the order permitting the survivors to prosecute for the benefit of all concerned was in accordance with law and the course of equity courts.

Since the Court below made an order permitting some claimants to prosecute for themselves and all others, it is unnecessary to discuss the question as to whether an order of revivor would have been proper and hence whether a demurrer to the alternative prayer for revivor was well taken.

The order actually made was proper.

"A Court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."

Mr. Justice Swayne in Seymour vs. Freer, 8 Wall., 202 (9-312.)

Where the parties are too numerous to be brought before it, it is an admitted ground for the Court to cause the form of the bill to be altered by making the plaintiff sue on behalf of himself and others.

1 Dan'l. Ch. Pr. p. 422, (Ed. 1865.)

The necessity for the formal petition for such relief arises out of the law;

That as between the parties who have been before the Court in the formal petition, it is necessary that the survivors shall ask permission formally to continue the suit as survivors.

Brown vs. Story, 2 Paige, 594:

And that up to the filing of the petition of revivor, there has been by the parties to the formal petition no distinct declaration that the suit is to be prosecuted for the benefit of all others not parties but having a common interest. It is

perhaps necessary that this should appear, but it can be made to appear by amendment at any time even up to final hearing:

Richmond vs. Irons, 121 U S. 46.

The petition for revivor was an offer to so amend and the order by the Court made on the petition was an allowance of the amendment.

The *purpose* of the request, among other things, was to obviate the necessity of bringing in numerous parties and of filing frequent bills or petitions for revivor consequent upon frequent changes in interest by death, marriage, etc.

This grant was made in 1818, eighty-four years ago. It was shown that the grantors have had many descendants, and that those descendants have multiplied greatly, and that there existed of those known to petitioners a number requiring three-quarters of a page of type-written matter for their enumeration. Some of these were of age and married, as shown by the original petition, in 1875 when it was filed, and were therefore when the amendment was made past middle age and any one or more of them might die at any moment, involving the necessity of innumerable bills of revivor with the consequent delay.

The communication required for the obtaining of the information necessary for such revivors, would be endless in work and time, for the petition for revivor shows that the parties known to the petitioners resided in the four quarters of the globe, Cuba, Maryland, Texas, Pennsylvania, Spain, France, Louisiana, London, Liverpool, New York, Mississippi, Virginia, California and Florida.

The necessity of a prosecution of a suit by representation of the many by the few is well shown by this Court in the following language:

"Where the parties interested in a suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible without very great inconvenience to make all of them parties, and would often-times prevent the prosecution of the suit to a hearing * * * * * legal and equitble rights and liabilities of all being before the Court by representation and especially when the subject matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained * * * * * it is manifest that to require

all the parties to be brought into the record as is required in a suit at law would amount to a denial of justice. The right might be defeated by objections to parties from the difficulty of ascertainment, or if ascertained, from the changes constantly occurring by death or otherwise."

Smith vs. Swormstedt. *et. al.*, 16 How., 302;
U. S. vs. Old Settlers, 148 U. S. 480.

There could be no objections to parties not joined coming in by intervention before or after decree if they could have originally joined. It is not and cannot well be denied that all could have joined in the original petition:

Harlan, J., in Osborne vs. Wisconsin Cent., 43 Fed. 824;
Tilford vs. Henderson, 1 A. K. Marshall, 483:
Scrimeger vs. Buchanon, 3 A. K. Marshall, 219.

It is true that in this case each party has a distinct title, for they all claim as tenants in common, and tenants in common have no unity of title. There is, however, community of interest and the question is common to them all —the validity and enforceability of the grant,—and this is sufficient. This Court in the case in 16 Howard just cited, says that representation of many by the few is allowed,

"Where the parties are very numerous, even though they may have separate and distinct interests, yet it is impracticable to bring them all before the Court. In this latter class, though, *the rights of the several persons may be separate and distinct*, yet there must be a common interest or common right which the bill seeks to establish or enforce."

The Court cites many cases of such common right which are analagous to these.

The Court uses the words "common interest or common right," but not the words "unity of interest or right," and elsewhere in the same opinion, shows that it means that the complainants must have "an object common to them all," or as Story puts it, the "question" must be "one of common interest:"

Story's Eq. Pl, 97, 98, 99, 103, 107, 110, 111, 116, 120;
Hallett vs. Hallett, 2 Paige 15.

Judge Nelson cites many cases and declares that the representation is permissible when "although there may not be any privity between the numerous parties, there is a

common title out of which the question arises and which lies at the foundation of the proceedings."

Cutting vs. Gilbert, 5 Blatch., 259, 261; Federal Cases No. 3559;

Approved in Scott vs. Donald, 165 U. S. 116.

The parties had a common right, though their interests were separate. Hence the order allowing the survivors to prosecute to a decree was in harmony with the announced practice of equity courts.

Smith vs. Swormstedt, 16 How., 302 text 303;

United States vs. Old Settlers, 148 U. S. 480;

Scott vs. Donald, 165 U. S. 116, citing Cutting vs. Gilbert, 5 Blatch, 259-261, Fed. Cases 3559;

Seaman vs. Slater, 18 Fed. 485;

Cushing, J. in Penhallow vs. Doane's Admr. 3 Dall. 118;

West vs. Randall, 2 Mason p. 181 & 189 text;

Mr. Justice Harlan in Osborne vs. Wiscon. Cent. etc., 43 Fed. 824;

Hallett vs. Hallett, 2 Paige, 15;

Gainer vs. Gainer, 30 W. Va., 402;

Tilford vs. Henderson, 1 A. K. Marshall, 483;

Meux vs. Waltby, 2 Swan., 281;

Hale vs. Hale, 146 Ill., 258;

Lilly vs. Tolbein, 102 Mo., 477;

Story Eq. Pl. Secs. 97 to 99, 103, 107, 110, 111, 116, 120, 357, 365, 369;

Mitford Chancery Pr., Secs. 58, 59, 61, 79, 167, 96, 76, 120;

Barton's Suit in Equity, p. 134.

The precise question is passed upon by this Court in the case of a proceeding like this where the heirs of Cirilo de Morant "as well in behalf of the interests of the heirs of Louis Doquemil de Morant and those of Laurent Millaudon as for themselves" (page 339.) The record shows that the heirs of these three parties were co-tenants, holding under the same title claimed to have been granted by Spain, and this Court, upon the objection being made that the "alleged claimants do not represent the whole title to the land claimed," disposed of the contention by saying (page 343,) "we perceive no reason why a part owner or the heirs or representatives of a part owner should not have the benefit of the proceeding, even if the present

petitioners do not show title to the entire interest in the land."

United States vs. Morant, 123 U. S. 335, 339, 343.

This case forecloses this question in our favor.

Of course, all parties for whom the suit is brought or continued may intervene, but if they do not, their interests will be protected in the final decree; or they may come in under it and take advantage of it.

"A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and to prevent a multiplicity of suits by allowing other distributees either through reference to a master, or by some other proper proceeding, to come in and share the benefit of the litigation."

Payne vs. Hook, 7 Wallace, 425 and citations;
West vs. Randall, 2 Mas. 181; Fed. Cases No. 17424;
Story's Eq. Pl., Sec. 89 and following;
Lockhart vs. Horn, 3 Woods, 542; Fed. Cases, No. 8446.

Thus, in this case the Court did not confirm the title to be in the petitioners (less than the whole number of claimants) nor award to them the scrip which would be issued under the act under which this proceeding is brought (Sections 6 to 11, act of 1860, 12 Statutes at Large, page 85,) but decreed "the claim valid, just and binding" "according to the principles established in the act" (Section 11,) and left the settlement of the respective rights of the heirs or representatives of the grantees in the land remaining unsold by the United States and in the scrip representing the lands sold for future determination:

Authorities Supra;
U. S. vs. Old Settlers, 148 U. S. 480;
Wabash, &c. vs. Beers, 2 Black, 448.

5. The defense of the Statute of Limitations was not properly raised and, hence, not available.

If the facts justifying it had appeared upon the face of the petition the defense might have been raised by demurrer, but no such facts so appeared.

If the right to recover against the United States was personal property, then the right to revive would accrue only to an executor or administrator and the statute would

begin to run only when the letters testamentary or of administration were issued. It follows, necessarily, that in such case, if the bill did not state the time of the grant of the letters, a demurrer because of the lapse of time since they were granted would not lie, but that the only way of getting the statute before the Court would be to plead it and the plea would have to state the time elapsed since the appointment of the legal representative.

Perry vs. Jenkins, 1 Mylne & Craig, 122;
Coit vs. Campbell, 82 N. Y. p. 513;
Gunton vs. Carroll, 101 U. S. 426, (25-986;)
Story's Eq. Pl, 831.

If the right to recover from the United States was real estate, then it descended to the heirs, and the right accrued at the moment of the death of the ancestor.

The bill of revivor, however, did not allege the date of the appointment of personal representatives, nor the date of any deaths of ancestors, and hence there was no point of time before the Court from which it could begin to calculate the running of the statute, or to begin to predicate laches because of delay.

If the defendant had made the defense by plea, then upon an issue joined upon it, the petitioners would have been able to put in evidence all the circumstances showing reasons and excuses for delay,—an opportunity which would have been denied to them if the Court had sustained the demurrer.

In Deloraine vs. Brown, 3 Brown's Ch. Cases, 646, Lord Thurlow held that "the defendant has not the right to avail himself by demurrer of an inference of fact upon matter which a jury in a Court of law could collect matter of fact to decide their verdict, or (matter on which) a Court would proceed in the same manner in equity. That limitation of time will bar a suit, where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend upon the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore, cannot be made on demurrer."

Brooks vs. Gibbons, 4th Paige, 375.

6. The defense of a loss of right by the lapse of time was not sustained by the facts shown on the bill or record.

A. It was a matter of indifference to the United States

whether the suit was or was not decided in favor of petitioner, except in so far as it was interested in seeing that no unfounded claims should be successful.

This is not an adversary suit. As a result of the treaty of 1818 between Spain and the United States, the latter became owner of all the public lands not granted away by Spain. It became a matter of importance that there should be a separation of the private from the public ownership. Such separation, however, would take much time, and in fact, acts providing for it have been passed from time to time from 1822 to 1860. During the period required for separation the United States did not desire that all its domain should be tied up, but it asserted title to everything, providing, however, for the compensation of such legal claims as it might trespass upon by such assertion and by any disposition of lands consequent upon it. It thus constituted itself a trustee for the true owner, and declared that it did not intend to claim any lands as its own absolutely, except those not granted to private individuals, and that as to this, its acts should not be construed as being adverse. The proceedings then authorized by Section 11, act of 1860, were not adverse proceedings to wrest from the Government property claimed by it, but proceedings authorized by the Government in its own court, as its own instrumentality, for the purpose of ascertaining the truth, and not for the purpose of hostile assertions.

U. S. vs. Boisdori, 11 How. 88;

Barry vs. Gamble, 3 How. 57.

The resort to the courts was the equivalent of its alternative (section 11,) that is, the resort to Commissioners provided by the other sections of the act, and it cannot be contended reasonably that the statute of limitations would run in a proceeding commenced before the Commissioners. The policy of Congress with reference to this class of cases has been often recognized and announced by this Court. In the language of Mr. Justice Field "they (the United States) have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking in extending their authority over the ceded country to enforce forfeitures, but to afford protec-

tion and security to all just rights which could have been claimed from the Government they superseded."

U. S. vs. Auguisola, 1 Wall., 352;

U. S. vs. Arredondo, 6 Peters, 746.

This Court has frequently recognized the fact that the United States is a trustee for the owners of lands under Spanish and other grants and, in its determination of the rights of claimants it will not regard itself as hostile to them, but merely as endeavoring to ascertain the truth of the matter. (See Argument under Assignment of Error numbered Four.)

B. No injury has resulted to the United States from the delay in having the order permitting some to prosecute on behalf of others made, because:

The character or quantum of proof required to be made was in nowise changed by the order. The same measure of proof would have to be made by a single petitioner as by all the claimants, for in both cases, so far as the United States was concerned, the only question was whether the grant had been made and was enforceable under the Act of 1860, and no more proof would have to be made whether there was one or more petitioners.

There was and could be, by reason of the delay, no loss of evidence pertinent to the case. The original grant was filed in Judge Brackenridge's Court and remained there accessible to the United States from 1830 to the time of its use by the United States in this suit. In like manner all the proceedings of that Court were available to and have been availed of by the United States, as the proceedings before the Land Commissioners and all the various copies of the grants filed from time to time in the Government Archives have been and are at all times public records and were not subject to loss, nor have they been lost. In short, the whole case depends upon documentary evidence which affirmatively appears to be as fully in existence now as at any past time.

All the proofs are documentary and by the treaty with Spain were placed in the custody of the United States, and there remain. Spanish land titles in Florida are not like California titles, where the original title papers or "espediente" seem to have been given to the claimants, the Government retaining a register or index, "a record of petitions presented and grants made." At any rate, the

titles in Florida were not such as might be fabricated. Here the "registro," "protocol," or "matriz" was and is retained in the Archives of the Sovereign, first of Spain, then the United States, to whom it was delivered by Spain. When the Act of 1860 was passed all titles which could be presented under the Act were in possession of the United States and had been, for thirty years, and the lands had been forty years in possession of the Government. There could be no injury to any rights possessed by the United States in allowing proof of ownership to be made at any time, in all proceedings begun within the time limited by Congress.

Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S. 685, (42-626;)

Galliher vs. Cadwell, 145 U. S., 368 (36-736.)

On the other hand, the delay has been of such serious prejudice to claimants that it must have been forced and unavoidable. Not to mention the great prejudice arising from death of the original parties and counsel, when this action was begun there were 471,172 acres of the Grant undisposed of. At the date of the final decree all but 79,681 acres had been disposed of by the United States. The indemnity certificate allowed by the act certainly cannot have the value of these lands, located as they are, and every year of delay has greatly injured petitioners while the United States has been unaffected.

Mere delay would not prevent or deter the Court from making the order.

The objection that petitioners were dilatory in reviving their suit after its abatement having been presented, by *argument*, on *demurrer*, there is nothing before the Court but the sole fact that nine years elapsed after death of counsel and destruction of the records before revival was sought. Without knowledge of any of the circumstances, upon this bare fact, the Court is asked to deny petitioners a right to show this valuable grant to belong to them, and to declare that these lands belong to the United States, contrary to the expressed policy of the legislative branch of the Government. Congress has admittedly acted with a commendable desire to do justice in these cases, but the fact remains that it delayed more than thirty years before granting petitioners a right to make proof of their title, meantime excluding them from possession.

Under Sec. 955, Rev. Stats., laches cannot be predicated

upon delay, as no time is prescribed, and because the other party can always compel prosecution. The Norway, 1 Benedict, 493. An equity case comes within the purview of this statute. Mr. Justice Story in Clarke vs. Mathewson, 12 Peters, text p. 172. Not mere lapse of time but change of situation during neglectful repose constitutes such laches as to defeat a right.

O'Brien vs. Wheelock, 184 U. S. text p. 493;
Nelson vs. Carrington, 4 Munf. (Va.) 332-342 (6 Am. Dec. 524;)
Wood on Limitations, Sec. 59, p. 119 (Ed. 1883.)

And when applied to a bill of revivor relating to lands there must have been a holding under claim of title adverse to the complainant for a period of time which at law would bar a remedy.

Elmendorf vs. Taylor, 10 Wheat, 176;
Shorter vs. Smith, 56 Ala. 208.

The limitations upon a writ of right was twenty years, or eleven years more than the delay shown in the case at bar.

Rhode Island vs. Massachusetts, 15 Pet., text 273;
Wood on Limitations, Sec. 36, p. 74, Sec. 59 p. 118, (Ed. 1883.)
Story Eq. Pl., Sec. 831.

Since mere delay is not sufficient to bar these rights there must have been some injury to the opposite side, or the facts must raise the presumption that the complainants had abandoned or released their claim.

There is absolutely no ground for presumption that petitioners had abandoned their claim after suit was instituted.

Where the facts and circumstances outweigh the presumption that the right has been abandoned the doctrine of laches has no application.

Townsend vs. Vanderwerker, 160 U. S. text, p. 186;
Wood on Limitations, p. 124-125 (Ed. 1883;)
12 Enc. Law, p. 533, p. 558.

C. The United States has failed to object to delay. It could, at any time, have moved to require the revivor of the suit or a petition such as was filed here, and it cannot complain when it could, at any time, have pursued the remedy which it had and did not pursue.

The Norway, 1 Ben., 173.

It has also acquiesced in the delay. The reports of the District Attorney from 1876 to 1890, which were made to the Department of Justice, (p. 50) show the cause to have been "continued" annually from 1876 to 1885.

The record thus establishes that by direction of the Court and with the sanction of the several District Attorneys and the Department of Justice this suit has been annually continued from 1875 until about the time fire burned the files and records. Having consented to the delay while the petitioners were able to proceed, certainly the United States must be held to have consented that a reasonable time for the procuring of the necessary facts and authority to restore the record and put the bill into shape to prosecute should be allowed. Certainly such consent should be implied from silence and failure to object, the conditions having changed by destruction of the records.

"Parties may agree to anything in reference to a suit, and having agreed it does not lie with them to complain."

Pacific, R. R. vs. Ketchum, 101 U. S. 289 (25-936.)

The record proves that up to A. D. 1885 the United States did agree to annual continuances. Until A. D. 1888 the pendency of the Dow suit was sufficient cause for the delay to prosecute this suit. The destruction of the records and death, with previous incapacity of counsel, followed hard on the reversal of the decree in the Dow suit. Upon a proper issue made petitioners would have been able to have satisfied this, or any Court that the nine years which elapsed after the Court House was burned before they established the burned records was not such a delay as charges them with laches. The testimony shows that only by mere accident and the zeal and persistency of the widow of the survivor among the early Counsel was there discovered the existence of the copies necessary to make such restoration of the record as would enable petitioners to proceed in their suit. If this discovery was made materially before the active prosecution was begun and pressed, that fact is unknown to counsel. No opportunity has ever been given to place in the records the important and interesting facts concerning the discovery that William McCabe was in posession of information and copies which would enable a restoration of the burned records, and why none of the claimants themselves were able to obtain this information.

Not having adopted the orderly practice prescribed, and either moved for a dismissal of proceedings for want of prosecution, or, at the proper time pleaded facts constituting grounds why the action should not be further prosecuted, the United States at all times having information as to the status of the action, and its representative always in Court, is equitably estopped from refusing to receive the proffered proof of title.

Equitable estoppel is founded on justice and fair dealing. "Its object is to prevent an unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforced by other rules of law."

Ricard vs. Sears, 6 A. & E., 469; 11th Eng. Ruling Cases, p. 78;
2 Pomeroy Eq., Sec. 902.

The facts, together with the history of the legislation of Congress show that the lapse of time in bringing to a judicial determination the claims under these grants was a matter of no interest to the United States. By a series of acts, beginning 1822 and ending in 1872, it threw its Courts open to the claimants. At the time of the passage of the last act more than fifty years had elapsed since any right of any claimant could have accrued and in fact rights of claimants in Louisiana had accrued more than seventy years. So it is conclusive that the United States had no fear that undue advantage to the claimants or injury to it would arise from the lapse of time after the vesting of the title in the claimant, and it surely could not complain at a delay after bringing of the suit and a delay inconsiderable in comparison with the delay which it, by its various acts of legislation, had declared to be no bar to a successful prosecution of a claim.

This Court has construed the principles which govern it in similar cases, as requiring that liberality be shown where parties come clearly within the terms of the statute, even if dilatory.

In the case of U. S. vs. Heirs of Clarke and Atkinson, 16 Peters, 228, after answer filed in 1830 a petition to revive was allowed on July 16th, 1840, a longer time than is complained of in the case at bar.

In the case of United States vs. Lawton, suit was begun in 1829, death of claimant suggested in 1834, and revivor

unsuccessfully attempted, and Bill of Revivor allowed in 1841, nearly eleven years after answer filed.

5 How. pp. 11-12.

E. In the High Court of Chancery, the practice of which prevails in this Court, there is no limitation against a bill of revivor.

Coombs vs. Jordan, 22 A. D., 274.

"The pendency of another suit is sufficient to avoid the plea of laches in failing *to institute a suit.*

Lawrence vs. Trustees, 2 Denio, text p. 585;

Pacific Ry. vs. Mo. Pacific Ry., 111 U. S. 505.

Much more should it be sufficient to justify failure to prosecute a pending suit.

Continued recognition of title is of like effect.

Seymour vs. Freer, 8 Wall., 202 (19-312,)

Waddell vs. United States, 25 Ct. Claims, p. —;

Sprujer vs. Sprujer, 114 Ill., 553;

Jackson vs. Horton, 126 Ill., 569;

Callender vs. Colegrove, 17 Conn. 1."

The Government made no attempt to contest the facts which entitled petitioners to revive. In such case revivor is of course. Under Eq. Rule 56 revivor is a matter of right where no cause why the suit should not be revived is shown by the other party.

Terry vs. Sharon, 131 U. S. 40 (33-96;)

Fretz vs. Stover, 89 U. S. 198 (22-789;)

Bettes vs. Dana, 2 Sum., 383; Fed. Cases 1368;

Mason vs. Hartford, etc. Ry., 19 Fed. 56;

Newcombe vs. Murray, 77 Fed. 493;

Wilson vs. Codman's Extx., 3 Cranch, 207;

Pendleton vs. Fay, 3 Paige, 204;

Story Eq. Pl., Secs. 364-377;

2 Danl. Ch. Pr. p. 1624 (3rd Am. Ed. 1865;) p. 1491 Note 2, and Sec. 1509, (6 Am. Ed.)

Third Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"III. The Court erred in granting the motion of the claimants to strike from the files the plea of the defendant to the Bill of Revivor."

The plea is on pages 62-64, Tr., the motion to strike on page 65, and the order striking on page 66.

The court did not err in its order striking the plea of the defendant to the bill of revivor, and this court will not review the correctness of the order.

1. The order striking the pleading was discretionary with the court below, and the appellate court will not review it.

2. The defense sought to be availed of in this place was the same insisted upon by the United States in its motion (p. 66 Tr.) (Fourth Assignment of Error,) to strike the amendment filed December 14, 1878, to the bill, to-wit: That the amendment introduced new parties after the time allowed by the Act of 1872 and after the right of said parties was, therefore, barred, and the defendant thus in a due and orderly proceeding obtained the benefit of the matters irregularly sought to be set up in this plea.

3. The plea was filed August 27th, 1902. The bill of revivor had been finally disposed of July 5th, 1902, by an order made thereon that the prosecution of the suit should thenceforward be by the survivors of the parties named in the amended petition. The Bill of Revivor was thereafter *functus officio*. No pleadings were then before the Court except the petition filed in 1875 and the amended petition filed by leave of the Court in 1878, and the original suit had been determined not to have abated.

4. The plea while attempting to contest the validity of the amendment to the original petition allowed by Judge Settle on Dec. 14, 1878, prayed judgment whether respondent should make further answer to the bill of revivor. The attempt to set up by plea a defect in the amended petition was not matter which could have been pleaded to a bill of revivor, if that bill of revivor had still been undisposed of.

"The general doctrine is that objection taken to an original bill, or which might have been taken, cannot again be made upon the bill of revivor, where the original suit has abated upon the death of the plaintiff. The only questions which can be raised are whether the party in whose name the revival is asked, has succeeded to the interests, rights or claims of the deceased, or has become the legal representative of his estate, so as to enable him to continue the prosecution of the suit, if not already deter-

mined, or to revive it so as to force a judgment of the suit if not already executed"

Mr. Justice Field in Sharon vs. Terry, 36 Fed. Rep. 346;
Fretz vs. Stover, 22 Wall., 198 (22-770;)
Slack vs. Walcott, 3 Mason, 508; Fed. Cases 12932;
Bettes vs. Dana, 2 Sum. 383; Fed. Cases 1368.
2 Barb. Ch. Pr. p. 52.

5. The plea was "to the whole" of the bill of revivor and hence contested a revival by the parties named in the petition as originally filed in 1875, but it attacked the amendment only, in which are named both the original parties and their joint owners, who had been brought in as parties by the amendment in 1878. If the plea were pronounced good, the only order which could have been entered on it would have been an order dismissing the whole proceeding, that is the original petition, not attacked by the plea, as well as the amended petition. Not being a bar to all the relief asked in the amended petition the plea is bad.

Milligan vs. Milleage, 3 Cranch, 220;
Piatt vs Oliver, 1 McLean, 295, Fed. Cases 11114;
Story Eq. Pl. Sec. 693, Note 4, (Ed. 1870.)

If the matter set up by the plea had been properly pleaded and to the proper pleading, appellees would have met it. Pleaded as it was to the Bill of Revivor already disposed of, the orderly course of practice required that it be struck from the files.

Fourth Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"IV. The court erred in denying defendant's motion to strike the amended petition from the files."

The amended petition is on page 5, the motion to strike on page 66, aud the order denying the motion on page 67.

The original petition was filed under the Act of Congress of 1860, (12 Statutes at Large, page 85,) and the amendment thereof passed June 10, 1872, (17 Statutes at Large, page 378,) which permitted the filing until June 10, 1875. It was filed by the heirs of John Forbes, who relied upon a grant of the King of Spain to John Forbes & Co., and who asked the confirmation of the grant to them. The petition alleges that the grant was made to John Forbes, but the

description of the grant, and the exhibits and recitals of the petition show that the grant relied upon was the grant to John Forbes & Co. It was filed on March 3, 1875, within the time allowed by law.

After the time allowed for filing an original petition, an amended petition was filed December 14, 1878, by the heirs of John Forbes, and the heirs of John Innerarity and of James Innerarity, alleging that the grant to John Forbes & Co. was to a co-partnershtp, composed of John Forbes, John Innerarity and James Innerarity, and asking that the rights of the Innerarityes be recognized in the final decree.

The amendment brought into the suit the heirs of James Innerarity and of John Innerarity, who constituted the "Company" of the firm of John Forbes & Company, and who were hence tenants in common of the lands claimed in the suit.

The motion to strike was founded upon the idea that the amendment constituted "a new and different suit upon the ground * * * * * that the same was not instituted and filed within three years from the 10th day of June, 1872, as required by law."

This court will not review the order of the court below in refusing to strike the amendment permitting the heirs of James Innerarity and John Innerarity to be formally made parties to this suit, and if it reviews will not reverse the action.

1. The allowing of amendments to pleadings is discretionary with the lower court, and the court will not review the allowance.

The decisions upon this point in this court are too numerous for citation, but as especially applied to applications by new parties to intervene, see,

Credit's Com. Co. vs. United States, 177 U. S. 117.

And the rule is applied even to the extent of a refusal to review the action of the court below, substituting one new sole plaintiff for one original sole plaintiff.

Chapman vs. Barney, 129 U. S. 677.

2. The court did not err in refusing to strike the amendment because,

a. The amendment merely put in formal shape what

would have resulted without it, since the persons made formal parties by it, would have obtained the same relief if it had not been made.

b. It was proper and admissible, even though filed after the expiration of the time allowed by the Act of 1860, as extended in the Act of 1872.

A. The counsel for the United States in the Court below contended that the amendment altered the cause of action in two respects:

The changing in the petition of the description of the grant relied upon from a grant to John Forbes to a grant to John Forbes & Co., and the introduction of the heirs of James Innerarity and John Innerarity as new parties.

As to the change of reliance upon a grant to John Forbes & Co , instead of upon a grant to John Forbes:

The original petition does allege that the grant sought to be confirmed was made to John Forbes, but the petition in itself, shows that this was a mere clerical error, and that the grant of which confirmation was sought was the grant to John Forbes & Co. This is shown beyond peradventure, by the fact that the petition sets forth in its body the metes and bounds by United States Survey, and the date of the grant, and annexes as a part of it, the report of the Land Commissioners at pages 94 to 96, 4 American State Papers, and the plat of the grant in controversy. The report of the commissioners deals only with the grant of the same date, by the same Governor, of the same land, made to *John Forbes & Co.*, and the plat shows the same land, with the same boundaries, and recites that it is the tract of land granted on the same date to *John Forbes & Co.*

Mr. Steele, who drew the original petition, probably knew nothing of the grant, except what appears in the American State papers, and from these title papers, it appears that the grant was made upon the petition to the Captain General of John Forbes alone This fact, or the fact that the legal title stood in the name of John Forbes, in trust for himself and his partners, may have led counsel to present the petition in the name of the legal representatives of Forbes alone and to have alleged that the grant was to *John Forbes.*

The only difference then, between the formal allegation of the petition and the grant actually described and relied upon, is that the former states the grant to be made to *John*

Forbes, while the latter relies upon a grant made to *John Forbes & Co.*

It is clear, however, that the petitioners intended to rely upon some grant, and that they did intend to rely upon the grant to John Forbes & Co., which was the only grant set forth.

The variance between the formal allegation and the description was apparent upon the face of the petition. If there was any uncertainty, and the defendant had any doubt as to what grant the petitioners relied upon, it could have moved to cause the petitioners to make the petition certain, but it cannot be heard after the limitation has expired to say that the petition relies unambiguously upon a grant which does not exist The mistake of allegation was purely clerical, is too clear for argument, and is amendable at any time.

This court in a strongly analogous case, allowed recovery of land at Miami River, upon a petition which described the grant as land at New River.

United States vs. Delespine, 15 Peters, 326.

As to the introduction of new parties:

It is too clear for citation of authority that equity will permit parties to be added for the purpose of presentation of their interests in the subject matter of the litigation. If this is done with the consent of the complainant, it is effected by means of an amendment to the bill. If without the consent of the complainant, it is effected by intervention. As to interventions, the Supreme Court of Florida has said:

"A party having a beneficial interest in the decree sought to be obtained, has a right to intervene by petition filed for that purpose at any stage of the proceedings."

Robertson vs. Baker & Macrae, 11 Fla. 192.

The Innerarity heirs are vitally interested in the decision to be reached on the question of validity of the grant, and have a right to be made parties.

"Where it appears on the face of the bill that there are others, creditors or legatees, who are entited to a ratable distribution with the complainants and who have a common interest with them, such others should be made parties to the bill, or suit should be brought by complainants on behalf of themselves and all others standing in similar situation, and it should be so stated in the bill. The objec-

tion might be obviated by amendment as was done in Good vs. Blewit, 13 Vesey, 397."

Egberts vs. Wood, 24 Am. Dec. text p. 238.

The amendment correcting the mistake in alleging that the grant set out and on its face appearing to run to the partnership, was to John Forbes alone, and then bringing in all the parties which the grant as set out showed were interested therein was a matter of course under Rule 28, if, as we contend, no new cause of action against the United States was thus introduced.

It is competent in equity to so amend the bill as to make even an entire new state of facts and to rely on the whole case made by the original and amended bill, because the original still remains of record and forms part of the case.

Hunter vs. the United States, 5 Peters. 173, text, 182;

Hall vs. Fisher, 3 Barb. Ch. 637.

An amendment is proper where the original parties show an interest in themselves which entitles them to invoke the jurisdiction of the Court, but the judgment or decree would not be complete without the intervention of another party, who would represent all others who have a similar interest.

The rule in England is declared to be that leave to amend a pleading ought never to be refused unless the Court is satisfied that the party is acting *mala fide*, or that his blunder has done some injury to the other side that cannot be compensated.

Bramwell, L. J. in Tildesley vs. Harper, 10 Ch. Div. 393, Vol. 2, English Ruling Cases, p. 780.

It may be allowed in the Court of Appeal, if there found necessary to let in the whole merits of the case.

Lewis vs. Darling, 16 How. 1, text, p. 8.

No new cause of action was introduced:

This is shown by the decisions of this Court defining the position to the United States in this class of cases.

The cause of action in the original petition was a determination of the validity of a grant to John Forbes & Co. So long as that cause remained unchanged, it makes no difference to the defendant who the parties asserting its validity are, if they are *bona fide* claimants, and hence the addition of one or more claimants does not make a new cause of action as against the defendant.

The position of the United States in the litigations respecting these foreign land grants is a peculiar one. While a defendant, it is not an adversary to the plaintiff. Under the eighth article of the treaty with Spain, all valid Spanish grants remained confirmed, and the United States as the successor of Spain, had only the function of ascertaining what grants were valid. The 11th section of the Act of 1860, required the court to "decide the grant valid, or invalid," and decree accordingly. Separating its private interest from its higher duty as the protector of the beneficiaries of Spain, the United States, through this court at once took position that it was of no moment what interested person brought the claim before the court. It would consider the question of title, and if found valid, confirm it for the benefit of whom it might concern. It imposed but one limitation upon the right to invoke the action of the court, and that was that the invoker should have an interest in the grant, and not be a mere interloper. Applying this limitation, it refused to confirm a grant at the instance of a person who had parted with all interest in it.

U. S. vs. Watkins' Heirs, 97 U. S. 219.

Or to confirm a title set up by one person on behalf of another with whom he showed no connection:

U. S. vs. Innerarity, 19 Wallace, 595

But while thus protecting the courts, it has displayed the broadest liberality in confirming the whole of grants at the instance of persons shown to be interested therein, but not to be owners of the whole, thus:

Persons interested in the claim before the court were allowed to employ the name of the original claimant in proceedings to establish the grant:

U. S. vs. Sutter, 21 Howard, 170.

In this claim, the claimant had alienated almost the whole of the grant, and this objection was made, but the court confirmed it for the benefit of all concerned.

The court approved the form of a decree in favor of one man for the benefit of whom it might concern in this class of cases, in

McMicken vs. U. S. 97 U. S. 204.

The court confirmed a grant to all the co-tenants upon the petition of one co-tenant:

U. S. vs. Morant, 123 U. S. 343.

The precedent was established in Perchman's case, 7 Pet. 51.

"The primary object of the act * * * * was to distinguish the vacant and public lands from those which were private property, and for this purpose, an inquiry into pre-existing titles became necessary * * * * The *mesne* conveyances were also required * * * * simply to enable the Board to determine if there was a *bona fide* claimant before it under a Mexican grant, and so this court has repeatedly declared that the government had no interest in the contest between persons claiming *ex post facto* the grant;"

U. S. vs. Sutter, 21 How. 170;
Castro vs. Hendricks, 23 How. 438.

"A decree in this form (in favor of one man for the benefit of whom it might concern) is often made against the government in these land cases when the title is satisfactorily established and the parties presenting it connect themselves with it so as to show some real interest to be protected."

Castro vs. Hendricks, 23 How. 438;
Brown vs. Brackett, 21 Wall. 387.

"But a mere stranger to the title can hardly ask the court to go to that length. It is not for every one who chooses to take up the prosecution of such claims without any connection whatever with the title sought to be established."

McMicken vs. U, S. 97 U. S. 204.

An amendment in a petition defective in substance was permitted, after the limitations had eqpired:

U. S. vs. Delespine, 15 Peters, 328.

The court says:

"Although the first petition was informal and *defective in substance*, still it would be too strict to say it was not the commencement proceeding, but that the amendment allowed by the superior court should be taken as the date when the claim was first preferred."

"The tribunals of the United States * * * are concerned only with the validity of the grants as they came from that (a foreign) government, and were not interested in any derivative title from the grantees further than to see that the parties before them are *bona fide* claimants under the grants:"

Brown vs. Brackett, 21 Wallace, 387.

In U. S. vs. Patterson, 15 How. 10, the claimant failed to connect himself with the original grantee for want of proof of a power of attorney. This Court said: "The operation of the judgment will be to perfect the title for the benefit of the legal representatives of William Barr" (the original grantee whose heirs attempted to convey.) The form of the decree was "it is the opinion of this Court that the grants set forth in the record are valid grants, and so much of the decree of the District Court as confirms them should be affirmed for the use of the legal representatives of William Barr, deceased."

The case of U. S. vs. Morant, 123 U. S. 335, before referred to was one in which the heirs of one of the co-tenants petitioned "as well on behalf of the interests of two others as themselves" (text p. 339,) and in U. S. vs. the Heirs of Clarke and Atkinson, 16 Peters, 228, the petition was in the name of Clarke "for himself and the legal representatives of George Atkinson, deceased," on a grant made to Atkinson, and though no title whatever was shown in Clarke, this Court in that, as in the Morant case, sustained the decree over the objection that petitioners did not represent the true owners of the lands.

In the Buyck case, the petition was in the name of Ann Buyck, widow of Augustus Buyck, and the "*unknown heirs of said Buyck.*"

Buyck vs. United States, 15 Peters, 215.

These cases demonstrate beyond question that if there were even one *bona fide* claimant before the court, the court considered the proceeding as one *in rem*, the *res* being the property granted. In analogy to all other proceedings *in rem*, parties not before the court in the beginning, could intervene for the protection of their interests, and even though they did not intervene, if the court was advised of their existence, it would administer the funds so that the decree should be for the "benefit of all concerned." This being so, the question of parties was, "with the limitation above mentioned," entirely subsidiary, for the cause of action was an entire thing,—the property and title placed in the jurisdiction of the court by the first proper invocation of its authority, and remaining there until the final disposition of it.

The *res* and title thereto in the case at bar were brought into court by the petition, filed in 1875, and remained there

until final decree. Who will be on final decree in this court, are now, or were in 1878 or 1875, the legal representatives of the three grantees designated in the grant as John Forbes and Company, is of no moment to the United States.

The manifest purpose of the suit as it related to the grant of lands in West Florida was to have a determination, as between the older title of the grantees and the junior title in the United States, whether there had been made by competent authority a complete grant of the tract of land located in the Territory of Florida, beginning at a point opposite the mouth of Sweetwater Creek on the Apalachicola River, and running due West to the Choctawhatchee River and embracing all the land between the two rivers, from that point South to the Sea, while Spain had the actual possession of the Floridas, so that these lands were not a part of the public domain ceded by Spain to the United States in 1820. In other words, whether these lands were or were not such public property of the King of Spain as passed title to the United States at date named in the Act of 1860, namely, the date when the United States received possession of West Florida.

The amendment of 1878 made no change in the subject matter of the suit instituted by the heirs of Forbes in which they erroneously alleged that Forbes owned the land at his death, (1823.) Their request is to be allowed to correct their mistake of averment and to be allowed to place on record their admission of a co-tenancy with the representatives of the partners in the firm of John Forbes & Co. as to the same tract of land which they had brought before the Court to be adjudged not the property of the United States.

The amendment was in fact unnecessary, as upon the title set out, a grant to John Forbes and Company, the legal ownership was in John Forbes as in the petition alleged, it was unnecessary to aver upon what trust he held it.

A grant to J. and Co. vests the title in J. for himself and in trust for his partners in proportion to their several interests.

Seymore vs. Freer, 3 Wall. 202;
Cross vs. Sabin, 13 Fed. Rep. 308;
Moreau vs. Saffarans, 3 Sneed, 595;

1 Wash. Real Prop. 574;
3 Wash. Real Prop. p. 241, (Ed. 1868.)

The trustee was competent to sue alone.

Van Vetchen vs. Terry, 2 John Ch. 197;
Hopkirk vs. Page, 2 Brock p. 20, No. 6697 Fed. Cases;
Mitchell vs. U. S. 9 Peters, 733;
Ely vs. U. S. 171 U. S. 220 (43-150;)
U. S. vs. Kingsley, 12 Peters, text, p. 485;
U. S. vs. Hanson, 16 Peters, 196 (10-935;)
U. S. vs. Forbes, 15 Peters, text, p. 182;
U. S. vs. Mitchell, 15 Peters, 89;
Henshaw vs. Bissell, 18 Wall. 255 (21-838;)
U. S. vs. Fossatt, 21 How. 446;
U. S. vs. White, 23 How. 249 (16-561.)

Where Chief Justice Marshal says, "All persons having a distinct interest, must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the Csurt. * * * * * The person having the equitable interest, if the suit be not really brought for his benefit, may insist upon being made a party and the court will direct it, etc."

Without amendment, proof of title to John Forbes & Co. would have been received on the averment that Forbes was the owner.

"If the objection to the deed is that it conveys only an undivided interest, while the declaration claims the whole tract the objection ought not to have been sustained."

Ch. Justice Marshall in Doe vs. MacFarland, 9 Cranch, text, p. 153.

No attempt was made to strike out or in any other respect alter the statements of the original petition as to the lands in controversy. That the representatives of Forbes, the holder of the legal title in trust for his partners, sought confirmation of the whole grant to the firm of John Forbes and Company, in no way prevents them from naming the representatives of the partners and admitting them on the record before the decree rendered. Their right to share in the result could not be denied and hence they were properly admitted to prosecute. The alteration of the averment of the petition that the particnlar grant of the particular

lands described and sued for was to the firm and not to Forbes personally, was consistent with the facts pleaded in the original petition when the whole is looked at. Whether the granted lands were held in trust or not did not concern the United States. In either case the land was severed from the public domain and became private property.

Mr. Justice Wayne in U. S. vs. King, 7 How. text, 893.

As deciding also the indifference of the United States to the question as to who the claimant of these land grants may be, and its concern only with the question whether the land was separated by Spain from its public domain before July 1, 1821, see,

Mitchell vs. U. S. 9 Peters, 733;
Ely vs. U. S. 171 U. S. 220 (43-150;)
U. S. vs. Kingsley, 12 Peters, text, p. 485;
U. S. vs. Hanson, 16 Peters, 196 (10-935;)
U. S. vs. Forbes, 15 Peters, text, p. 182,
U S. vs. Mitchell, 15 Peters, 89;
Henshaw vs. Bissell, 16 Wall, 255 (21-838;)
U. S. vs. Fossatt, 21 How. 446;
U. S. vs. White, 23 How. 240 (16-561),

Not only, however, do the decisions of this court relating peculiarly to the class of cases under consideration, show that the original petitioners could have continued the prosecution of the suit for the benefit of the co-tenants, and hence that the amendment added nothing to the rights of the contending parties and subtracted nothing from the rights of the United States, but the same doctrine is clear upon general principles, and upon authority, for the suit is in the nature of an ejectment suit, in which one co-tenant can sue for the whole common property and recover it in his own name, but for the benefit of himself and his co-tenants, and of course being partly for their benefit, they can intervene and represent their own interests.

Proceedings under this act are declared to be substantially an ejectment proceeding:

Scull vs. U. S. 98 U. S. 410.

And in ejectment proceedings, a tenant in common may sue for the whole tract, and upon recovery, will hold it for himself and his co-tenants:

Poole vs. Fleeger, 11 Peters, 185;

Moody vs. Johnson, 112 N. C. 546; 17 S. E. 579;
Newman vs. Va. etc. 80 Fed. 228;
Pierson vs. Grice, 6 La. Ann. 232.

Here Forbes' heirs are co-tenants of Innerarity heirs, and having claimed the whole property, they would if adjudicated to them have held the excess over their own share for the benefit of their co-tenants. In fact, the court could, upon its appearing that there were others interested, have so framed its decree as to conserve such interests:

Authorities *supra*.

See also the following from this Court:

"If this bill had been prosecuted, as originally framed, to final decree, and had resulted in the recovery of assets of the bank applicable to its purposes, it would necessarily have been made to appear during the progress of the suit that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained, equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of having reduced his claim to judgment or by reason of having first filed a bill to enforce the trust."

Richmond vs. Irons, 121 U. S. 27.

In United States vs. Morant, 123 U. S. 343, there was a petition by one part owner of land granted for a confirmation under the statute of 1860, and the court says:

"We perceive no cause why a part owner or the heirs or representatives of part owner should not have the benefit of the proceeding, even if the present petitioners did not show title to the entire interest in the lands."

This being true, it was a matter of course for the court to permit such other part owners to come in and represent their interests.

And this court says that an amendment changing the parties will be allowed when the liability of the defendant is not increased.

The Beaconsfield, 150 U. S. 312.

b. If we have shown, as we think that we have, that the heirs of John Forbes could, without amendment, have procured the confirmation of this grant for themselves and for the heirs of the Innerarity's, and hence that the admis-

sion of the Innerarity's into the suit did not make any new cause of action, then it necessarily follows that they could be admitted as well after as before the time limited in the Act of 1872.

If an original suit is begun before the statute of limitations runs, the addition of the new party after it has run may or may not be admissible, according as the introduction of the new party does or does not create a new cause of action against the defendant. The newness of the party is entirely unimportant. If he asserts a new right, independent of, and not connected with that asserted by the original party, the defendant can plead that such new right was not asserted within the time limited by law, but if a new party comes into a suit for the purpose of presenting an interest in a right or claim in the matter in controversy already set forth and claimed in the suit by a person with whose asserted interests his interest is connected, then he introduces no new cause of action, and the defendant cannot plead the statute as against him. The authorities which we will cite will show this to be the rule.

We, however, are not dependent upon general reasoning, for there are authorities directly in point, and many controlling analogous ones. We cite and quote some of them.

This court has decided the question directly.

On the 23nd of May, 1829, Clarke filed a petition, in his own name, for himself and the heirs and legal representatives of George Atkinson, deceased, claiming a right under Atkinson to——acres of a grant made to Atkinson by Spain in 1816. The Government answered May 21st, 1830. Clarke having died, in July, 1840, his heirs filed a petition to revive the suit, which was granted, and the cause came on for hearing. At the hearing counsel for claimants "then moved the Court that the cause might proceed in the name of Philip R. Young" and others, "heirs and legal representatives of George Atkinson." "No deed or conveyance or evidence of any kind was offered to show that either Clarke or his heirs had any interest whatever in the land." On the ground of want of interest when he instituted the suit and also because the time limited by the Act of Congress for the commencement of the proceedings had expired before the heirs of Atkinson were made parties, the Attorney General contended that the Court was without jurisdistion. Mr. Justice Catron, especially familiar with these

cases, and before whom many had been tried when on the Circuit in Missouri, delivered the opinion of the Court in which all the contentions of the Attorney General were overruled.

U. S, vs. heirs of Clarke and Atkinson, 16 Peters, 228.

The ground of objection here is identical with the second objection made by the Attorney General in the case last cited and if the case was of small magnitude it might well be rested upon the decision announced therein.

The following cases are exactly analogous in principle.

"Suit was originally brought in the name of M. Becnel only, who sued as the sole owner of the land, and claimed the whole damage for the trespass. It subsequently transpired that Lezin Becnel was an undivided co-owner of the land, and he thereupon filed an intervention alleging the fact, and joined in the demand."

This was filed after the statute of limitations had expired, and that fact was pleaded. The court says:

"If the plaintiff had recovered, it would have inured to the joint benefit of the co-owner who would have compelled him to account. The action clearly indicated to defendant the entire cause and object of the claim and the title on which it was founded, which is sufficient to interrupt prescription as to both the co-owners:"

Becnel vs. Wagnespack, 40 La. Ann. 109; 3 So. Rep. 536.

A suit brought on a note before the bar of limitation is complete, will inure to the benefit of one intervening after the time when, but for suit begun, the claim would be barred:

Foote vs. O'Roork, 59 Tex. 215.

The court says:

"The intervenors do not assert a new cause of action but only claim an interest in the cause of action already asserted against the defendant."

A co-plaintiff was added by amendment after the statute had run. The court says:

"The defendant contends that by this amendment a new and different cause of action is to be tried. This is not the effect of the amendment. The amendment permits a party interested as co-plaintiff in the identical claim presented to the Commissioners to enter and prosecute. The cause

of action is restricted to the claim presented before the Commissioners to the same extent it would be if the amendment were not allowed. The claim is not enlarged or changed by reason of the amendment."

Wyman vs. Wilcox' Estate, 63 Vt. 487; 21 Atl. 1103.

The court decided that a wife was a tenant in common with her husband in certain real estate, and must join in an action with him for injury to it. A suit was brought by the husband alone and after the statute of limitations had run as to the wife, she was made a party plaintiff by amendment.

The court said;

"The statute (of limitations) will be no obstacle to prevent an amendment which will merely complete a cause of action which is substantially disclosed from the pleadings:"

Vunk vs. Raritan, &c. 56 N. J. Law, 395; 28 Atl. 593.

"An amendment within the power of the Court to allow is not the beginning of a new action so as to subject the suit to the operation of the statute of limitations which was not a bar at the time of instituting the action."

Guild vs. Parker, 43 N. J. Law, 43.

Action by one partner on a partnership debt. Plea of the existence of the partnership. Plaintiff was permitted to amend after the statute of limitations had run by adding the other partners.

Dixon vs. Dixon, 19 Iowa, 512.

Suit in the name of the assured in an insurance policy. After the limitation had elapsed, the mortgagees for whose benefit the policy had been made were added by amendment:

The court said:

"There is no just ground for the claim that by reason of the amendment making new parties plaintiff there resulted any change in the cause of action. The object of the suit after the amendment was precisely the same as it was before, viz., to recover the amount of the policy on account of the destruction by fire of the insured premises, and so far as we can see, assuming there was a right of recovery at all, it was and is a matter of total indifference to the company whether the recovery is in the names of the Manns or in the name of Thomas for their use. Had some new

claim or cause of action been introduced into the suit by the amendment, against which the statute of limitation had run, or before the making of such amendment, the position of appellee would be clearly right; but such is not the case."

See also U. S. Ins. Co. vs. Ludwig, 108 Ill. 514, 518, where the court says:

"Defendant was in court, and it was a matter that could make no possible difference so far as it was concerned, whether the judgment was rendered in favor of the parties beneficially interested in the cause of action, or in favor of the party having the legal right to sue, as was done, since the amendment was permitted. It was the same suit and the same claim for which the action was intended to be brought, and the action must be regarded as having been commenced when the original summons was issued, which was in time to save the bar of the limitation clause of the policies as to the time of the commencing of suit or action."

The same court says:

"In this case, the amendment did not make a new cause of action. The claim as originally filed, was for the amounts of certain notes and other property turned over by appellee to Mrs. Dwyer in her lifetime. After the substitution of appellee's name the claim was still for the same notes and property. April 11, 1881, the day on which it was filed, was within the two years. Where no new cause of action is introduced, courts will allow amendments liberally, for the purpose of avoiding the running of the statute."

McCall vs. Lee, 120 Ill. 261; 11 N. E, 522.

If the amendment states such a case as might have been made in the original bill in the alternative, or a case stated as the original bill might have been drawn, making no new party defendant, or new issue of fact or claim, the allegation being varied as to a subject within the *lis pendens*, it does not make a new case, and the Statute will run only to the filing of the original bill.

Winston vs. Mitchell, 93 Ala. 554-9: 9 So. Rep. text, p. 552-553.

In this cited case the original bill alleged defendant to be owner of the land as trustee under a resulting trust and prayed a decree for conveyance. The amended bill alleged that the defendant was owner subject to a lien for part of the

purchase money furnished by complainant and prayed enforcement of this lien. The Court held this amendment only varied the allegations as to a subject matter already in issue to meet a state of facts proved, which authorized relief, and did not make such a new cause of action as to let in the Statute of Limitations.

The cases of Jones vs. Van Doren, 130 U. S. 684, and Brainard vs. Buck, 184 U. S. 99, are to the same effect and the facts are similar. If there is equity in the case when fully stated and correctly applied to the proper parties, an omission of parties or mistake in some fact connected with the substance of the case, but not forming the substance itself, is usually allowed to be corrected by amendment.

Lyon vs. Tallmadge, 1 John. Ch. p. 184.

In Hardin vs. Boyd, 113 U. S. 756 (28-Led.) this Court refused to allow the statute of limitations as a bar to an amendment presenting a new statement of facts, the matters in the original and amended bill having arisen out of one transaction capable of being incorporated originally into one suit. The court says, "the amendment had no other effect than to make the bill read just as it might have been originally prepared."

As shown by the case cited from 93 Ala. 554, the statute becomes a bar only when the amendment introduces new matter or a different cause of action, not within the *lis pendens*, and this is clearly illustrated in the language of Mr. Justice White in a late case in this Court in these words: "The principle is that the running of the Statute is interrupted by the suit and summons so far as the cause of action then propounded is concerned. It interrupts it as to all matters subsequently alleged by way of amendment which are part thereof," that is, part of the cause of action as first presented.

Union Pac. Ry. vs. Wyler, 158 U. S. 287.

There can be no dispute that the cause of action in the case at bar, which was presented by the petition filed in 1875, is whether the lands contained in the grant therein set out and described as made to John Forbes & Co. were private lands at the date when Florida passed from the sovereignty of Spain to that of the United States.

United States vs. Arredondo, 6 Peters, 736 text;
United States vs. Forbes, 15 Peters, 182.

No injury being possible to the respondent, and the matter introduced by the amendment being within the *lis pendens*, or cause action originally presented, the amendment took effect as of the date when the original petition was filed, March 3, 1875.

Richmond vs. Irons, 121 U. S. 27;
French vs. Hay, 22 Wall. 238;
Neale vs. Neales, 76 U. S. 1, (19-591;)
Tremaine vs. Hitchcock, 90 U. S. 518;
Bray vs. Creedmore, 109 N. C. 49;
Lilly vs. Tobbein, 103 Mo. 477; 23 Am. St. Rep, 887;
Penn. Co. vs. Sloan, 24 Ill. Ap. 48-125 Ill. 72;
Sublett vs. Hodges, 88 Ala. 491;
Wood on Lim. 294, (Ed. ;)
1 Danl. Ch. Pr. Sec. 402;
Story Eq. Pl. Sec. 332;
Rule 28 Eq. Rules.

In Lilly vs. Tobbein, above cited, an unincorporated church sued. After the time allowed for bringing action an amendment substituting individual trustees as complainants was made. The Statute of Limitations was pleaded in bar. The Court says, "where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point * * * There is a vast difference between substituting a competent for an incompetent plaintiff and bringing in a new defendant. Substituting the party having the legal right to sue for the claim for which the action was brought, instead of another party improperly named as plaintiff is not the commencement of a new action, and in such a case the amendment relates back to the commencement of the action," citing United States Insurance Co. vs. Ludwig, 108 Ill. 514.

Whether an amendment constitutes a new cause of action is determined upon the same principles in equity as in law. At law the test applied has been to ask whether a recovery on the original declaration would bar a recovery under the amended declaration.

Davis vs. N. Y. R. R. Co. 160 N. Y. 646.

If it would not, then the amendment constitutes a new cause of action; if it would, the new pleading is an amendment.

Another test is to inquire; 1st, will the same evidence support both the original and the amended declaration; 2nd, will the same measure of damage apply to both.

Unless both these tests fail the new pleading is an amendment and not a new cause of action.

Scovill vs. Glassner. 79 Mo. 449;

Texas & Pacific Ry. Co. vs. Cox, 145 U. S. 593, (36-833;)

Gormley vs. Bunyan, 138 U. S. 623 (34-1089.)

In the case at bar the facts stated in the original and amended petition are based on the same rule or principle of law and that principle is to be applied upon the same transaction or subject matter of the action, namely: the title to the grant to Forbes & Co., which is stated at length in Vol. 4 Am. State Papers, p. 94 *et seq.*

This principle of law which the Court was in each petition called on to apply is to determine whether the lands, the subject matter of the suit, were in fact private property on July 21st, 1821.

While not a case of the introduction of a new party, the case of the United States vs. Heirs of Clark & Atkinson, shows strongly the attitude and liberality of this Court in its application of the limitation to this class of cases.

The record of the case of U. S. vs Delespine shows that the original petition filed in November, A. D. 1830, within the time allowed, relied upon a grant of land made by the Captain General of Cuba at New River, to petitioner's predecessor in title; that at the November Term, A. D. 1835, after the time limited by the Act of May 26th, 1830, for instituting any action for confirmation, the petition as filed was amended to seek confirmation of a grant of lands, made to such predecessor by the Provisional Committee at Havana, situated on the Miami River, twenty-five miles below New River. This Court, upon objection made by the Attorney General, said it would be "too strict" in proceedings of this character to hold that the petition for confirmation of the latter grant should date from the time of the amendment, and refused to apply the statute of limitations even where on the face of the amendment the facts above stated appeared.

See the record in U. S. vs. Delespine, 15 Peters, 326, Case No. 9, Jan. Term, 1841.

For a very instructive case, fortified by numerous per-

tinent authorities as to the allowance of amendments introducing new parties after the statute of limitation has run, and deciding that such amendments would be permitted for the very purpose of defeating the Statute, see,

McDonald vs. State of Nebraska, 101 Fed. (C. C. A.) 178, *et seq.*

Fifth Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"5. The Court erred in granting the motion made by the claimants, at the hearing of the cause, to amend the petition by adding immediately before the prayer for relief therein the words following, viz., "That the grant (hereinbefore correctly described, except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain General of Cuba on February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818."

The position of the United States in the Court below was that the amendment created a new cause of action, because,

1. The original petition relied upon a grant made on January 10th, 1818, while the amendment relied upon a grant made on February 20, 1818; and because,

2. The original petition based the right to recover upon the treaty of 1819, while the amendment based the right to recover upon the act of 1860. And that,

3. The new cause of action was barred, because introduced into the case after June 10, 1875, the date fixed in the act of July 10, 1872, as the limit for instituting such action.

The order of the court permitting the making of the amendment so that the petitioners could rely upon the grant made on February 20, 1818, instead of the grant alleged to have been made on January 10, 1818, is not reviewable in this court, and if reviewable, was correct and will not be reversed.

I.

The answer in this court to foregoing contentions of the United States are:

a. That the order of the Judge permitting the amendment is not reviewable here;

b. That there was no objection or exception by the defendant to the allowance by the Court, but on the contrary, the allowance was procured by the defendant;

c. That if the defendant had at any time a right to object to the allowance of the amendment, it waived it by pleading over.

d. That even without the amendment the difference in the date of the grant pleaded and the one in proof, would not have been a variance preventing a recovery upon the original grant in proof;

e. That if it would otherwise have been a variance, none can be insisted upon by the United States, for not only did it not object to the introduction of the grant, but it itself introduced it.

f. That a variance does not prevent a recovery unless the defendant has been misled and a fair trial prevented.

g. That no new cause of action was introduced by the amendment, and hence it related back to the filing of the petition and the limitation did not bar a reliance upon the grant embraced in it.

A. The action of the court complained of was a very usual and ordinary case of amendment at the hearing of a bill in Chancery to meet the proof and the settled rule of this court is that orders permitting amendments in such cases are not reviewable here.

Neale vs. Neales, 9 Wall. 1;
Richmond vs. Irons, 121 U. S. 46.

B. No objection or exception was made by the United States in the Court below.

Of course to make an objection to an order available in the appellate court, when such an order is reviewable at all, there must be timely action in the court below.

Clements vs. Moore, 6 Wall. 310-311.

In this case, not only was there no objection by the United States, but it itself procured the allowance of the amendment. The fact is, that it at first consented (p. 105 Tr.) but afterwards withdrew the consent (p. 106 Tr.) There was not, however, still any objection by it to the making of the allowance. but upon the contrary the appli-

cation to amend was, "by consent of the parties," "submitted to the Court." It is also a fact that the amendment was allowed only after formal motion by the United States, upon what it called "suggestion of diminution," (p. 109 Tr.) and since this allowance and the placing of it upon the record by the United States, not for the purpose of objecting to it but for the purpose of being allowed to file an answer to it (pp. 110-111 Tr.) clearly there was nothing to intimate to the court below, or to this court that the amendment was in *invitum* as to the United States.

C. If the United States had any right to object to the allowance of the amendment and the change alleged to have been introduced by it, the objection was waived by filing the answer without any reservation of the objection and thus pleading over.

D. The amendment was unnecessary, for without it, the proof of the Registro of a grant made on February 20, 1818, instead of the grant alleged to have been made on January 10, 1818, would have been admissible, as there would have been no material variance.

It will be noted that such was the view of the court below, for, while it, prior to its final decree, permitted the amendment, yet, no amendment was made and the court without the amendment decreed the grant to be valid, and only thereafter upon the request of the respondent, entered its order *nunc pro tunc*, that the amendment be made. Whether there was or was not an amendment made was entirely immaterial.

If there had been no amendment the result would have been the same, *i. e.*, that the grant would have been admissible as a ground for recovery under the allegation that the grant had been made on January 10, 1818. If there were an amendment setting up a grant of the later date, the question, if properly presented, would arise as to whether the amendment showed a new cause of action and was, hence, a departure; if there was no amendment the question would arise, upon the offer of the later grant, as to whether it showed another or new cause of action and, hence, constituted a variance between the grant alleged and the grant sought to be proved.

There was no material variance, because the grant alleged and the grant proved and relied upon were identical,

except in the matter of dates, which were not by the pleadings made matter of description or substance.

Further it is to be noted that respondents produced the original title papers, proved that they had been delivered by the Government of Spain to the Agent of the United States, and offered them in evidence. This was conclusive evidence against the Government, unless its plea of *res judicata* were sustained.

Cook vs. Barr, 44 N. Y. 158 text.

It is a fundamental rule of evidence that a party is bound by the testimony he places on record in his behalf.

The Government by its own proof at the trial established that Spain had granted the identical lands, to the identical grantees, by a title made forty-one days later than averred by petitioners. The proceedings being authorized by the United States expressly for a determination whether or not there existed a title prior to that made to it by the cession of Florida, when this fact had been proved, though proved by the Government's evidence, the United States cannot refuse to recognize and confirm that title, merely because petitioners alleged it to have been made one month earlier than in fact it was made. The matertal issue,—was this tract of land the private property of Forbes & Co. when the Spanish flag was lowered in Florida—was conclusively proved. Whether the true date of the title papers is January 10th, as altered, or February 20th, as originally signed, is immaterial. In either event the land was not ceded by Spain to the United States, but was owned and possessed by petitioners' ancestors on the 21st of July, 1821. This fact having been proved, both by the authenticated copies of the title papers, and also by the "registro" produced by the Government, certainly the Court will not refuse to decree that the United States by the Act of 1860 are required to recognize petitioners' rights merely because in stating them they alleged that the Captain General made the grant on January 10th, when in fact he made it on February 20th.

"The United States has not submitted this case to her highest court of equity on such grounds as these" * * * * "The proceedings is in equity; according to its established rules our decree must be in conformity with the principles of justice."

U. S. vs. Arredondo, 6 Peters, p. 746.

The courts are to decree the grant sued for valid or invalid, according to the principles prescribed in the statute and the general principles of equity. Act 1860, Sec. 11.

The difference of dates not being of substance or description was immaterial and no variance, for it is well settled that a difference in the date upon which a contract has been alleged to have been made and that upon which it is shown by the proof to have been made, is no variance. The doctrine is thus stated:

"The rule that allegations of time, quantity, value, etc., need not be proved with precision, but that a very large departure from the time, quantity, etc., is allowable, is so well understood and so much a matter of every day practice that no citation of authority to sustain it is necessary. An indictment charging a prisoner with murder on the first day of July would be sustained by proving the murder committed on the 15th of that month. How much more reasonable that a contract alleged to have been made on the first, may be supported by evidence of the same contract made on the 15th of the month."

U. S. vs. LeBaron, 4 Wall. 642.

We know of no exception to this, except in cases where the date is matter of description, but it is not matter of description when the allegation is "merely the usual necessary allegation of the time when the contract was made."

Ibid.

The distinction is shown in a case where suit was brought upon a warrant, in which the court said:

"If the declaration had said that the warrant *bore date* the 7th day of May, this would have been descriptive of the warrant, but not when it is alleged that the arrest and commitment *happened* upon that day."

Henry vs. Tilson, 17 Vt. 479.

This is applicable to deeds, for a date is not of the substance of the deed;

Goddard's Case, 2 Co. 5 a; 2 Blackstone's Com. 304;
Moody vs. Hamilton, 22 Fla. 298;
Jackson vs. Schoonmaker, 2 Johnson, 230-234;

and the date may be rejected,

Swan vs. Hodges, 3 Head (Tenn.) 251-254.

In Blackwell vs. Patton, 7 Cranch, 471, the Court permitted an amendment altering the date of the demise

stated in a declaration in ejectment. And this action is analogous to an action of ejectment.

Scull vs. the U. S., 98 U. S. 410.

The point here is covered exactly by the following:

"Where the allegations and the proofs of a patent agree as to the county wherein the land is situated, the survey number, quantity of land, certificate number, original patentee, the person to whom the patent was granted, and the number and volume of the patent, the fact that the allegation is that the patent was issued February 7, 1857, and the proof is that it was issued February 11, 1857, is not material."

Kennard vs. Withrow, (Ct. Civ. Appeals Texas) 28 S. W. Rep. 226.

In the case at bar, as we have said, the agreement between the grant as alleged and the grant as proved is complete in the matter of grantor, grantee, consideration, description and all of the particulars except the date, which was the situation in the Texas case just cited.

In this case the date of the deed was not matter of description, the allegation being, as to it, that Cienfuegos, Captain General, "on that day (January 10, 1818,) made a formal grant to John Forbes of the lands described (in Spanish,) substantially as translated above, had the same signed, made of record, and deposited among the government records."

This allegation is like the one in U. S. vs. LeBaron, 4 Wall., heretofore cited which the Supreme Court declared not to be matter of description.

The descriptive portions of the allegations in the petition are the statements as to grantor, grantee, the property conveyed and the consideration. It is unnecessary to say that these descriptive averments are found exactly in the original offered in evidence, and, indeed, the answer of the United States admits that the original registro was altered, "the alterations being in the dates of the original." (p. 70 Tr.)

The grant offered being identical with that alleged, except in date, the difference in date was immaterial, for,

The date was non-essential under the act of 1860, under which the petition was brought, since the time of making a grant, to bring it under the act, was of no moment so long as it was before the cession or while Spain was in poses-

sion. An allegation of any date between these periods would have sufficed as well, or it would have been sufficient to say that the grant was made before the cession of Spain, or during the possession of Spain, without stating the date and, therefore, the statement of the exact date was unnecessary, immaterial, and could furnish no basis for a variance.

Board of Commissioners vs. Keene, &c. 108 Fed. 505-515.

An analogous principle, as applied here, is stated to be that whenever the legal effect of two instruments, the one averred and the other proved, is the same, whether the words constituting the alleged variance be inserted or not, such variance is immaterial.

Cannell vs. Milburn, 3 Cranch, (Cir. Ct.) 424;
Fed. Cases, No. 2384;
Nash vs. Towne, 5 Wall. 689-698, (18-529;)
Cited in Moses vs. U. S. 166 U. S. 580.

If our construction of the intention and effect of the act of 1860 be correct, the legal effect in this case of the grant from Spain to Forbes was the same whether it was made on January 10, 1818, or February 20, 1818, for both dates were before the surrender of possession by Spain and a grant made on either date would be entitled to be confirmed under the act.

The use of the Registro upon final hearing, instead of the copy of the exemplification set forth in the petition, could not be reckoned as a variance debarring the petitioners from relief, because the petitioners under the law of Spain governing the evidence of grants could not rely *in limine* upon the registro, the only use of which in evidence was to correct an error or alteration in the original, when such original should be offered in evidence.

Under the law governing the effect of Notarial copies of written instruments executed according to Spanish law, the averment in the petition filed in 1875, that the Captain General made the grant on January 10th was proper, and only after the Government filed the "registro" showing that the dates in the authenticated copies given the grantees followed the alteration made in the "registro" was it proper that they should move an amendment to meet the proof before the Court.

Petitioners were required to make proof of their grant upon the title papers given by Spain.

U. S. vs. Hanson, 16 Pet. 199-200-201 (10-936-937;)
U. S. vs. King, 7 How. text 887-888, (the deed given to the party is the original though taken from the protocol;)
McMicken vs. U. S. 97 U. S. 210 (24-949;)
U. S. vs. Turner, 11 How. 665-668 (13-858-859.)

Under the laws and usages of Spain, the notarial copy is alone evidence in judicial proceedings. The "registro" is only used therein in case the notarial copy is impeached, and then merely to settle the doubts which arise from the impeachment of the authenticated copy.

By the Spanish law written instruments are divided into three classes: "registro," "original," and "traslado." "The registro is the original paper executed, and remains in possession of the Notary to be introduced and used as a protection against fraud, and from which others are copied, and by it we determine any doubts which may arise.

Beyond this use, for which it may be introduced, it is not of use, nor of any effect in a court of jurisdiction, nor does it have any effect as proof.

Translation from page 90, The *Curia Philipica del Juicio* Civil (Edition 1797, Madrid,) title, *Prueba*, Chapter 17, Section 31.

To the same effect is the *Febrero Adicionado*, Part 1, Chapter 14, paragraph 10.

In the case at bar every "copia original" or authenticated copy known to be in existence, those given the grantees as well as those furnished by the Spanish authorities to the King, and by Spain transmitted to this Government, gives the date as January 10th, 1818.

This is prima facie proof that the original is of like date.

U. S. vs. Wiggins, 14 Pet. 346;
U. S. vs. Percheman, 7 Pet 85;
U. S. vs. Delespine, 12 Pet 655;
U. S. vs. Mitchell, 9 Pet. 732;
Gonzalez vs. Ross, 120 U. S. 605 (30-808.)

By the Spanish law (with which the French law agrees) until the public charge of falsity has been made (and established) the Notarial copy is authentic in point of form. The "copia original" imparts absolute verity until the contrary has been established in due form of law. In the case

at bar upon the mere production of the "registro" from the Spanish Archives, the alteration appearing upon its face, (even without any "*salvado*") there is a presumption that it was made by authority, because it has at no time been out of official custody, and because in its altered form it has been authenticated at least three times by Spanish officials. (Tr. pp. 145-156-166.)

Without reference to the presumption of authenticated copies, petitioners in making proof of their title were restricted to the notorial or authenticated copies. They were full proof until such time as the "registro" was produced, proved and filed in evidence to determine the true date, after a conflict in dates was shown to exist.

"An original copy given, signed and authenticated by the Notary who made, perfected and authenticated the protocol, and containing all these requisites, is full proof in judicial proceedings (plena fe en juicia.")

Translations of Febrero Adicionado, Part 1, Chapter 14, Section 11.

"The authentic documents given by the competent authorities constitute full proof (plena prueba,) as also do the copies of the protocol (registro) by the Notary who took them."

Manuel del Abogado Americano, Vol. 2, p. 62, Title 13, de las pruebas;

1 White's Recopilation, p. 297.

The law as here declared has been recognized by this Court,

Owings vs. Hull, 9 Peters, text, p. 625;

United States vs. Sutter, 21 How. 170 (text 16-120.)

As stated by Justice Campbell "for the reason that those, like these, are certified by the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it;" citing 2 Eschreche's Dictionary of Law, p. 185;

U. S. vs. Davenport's Heirs, 15 Howard, text, p. 7.

Besides the two copies of this grant furnished to the ancestors of petitioners, filed in evidence, the Government of Spain has twice furnished the United States a copy, agreeing in all respects with the authenticated copies furnished the grantees in 1818, and 1824, respectively.

These copies out of the State Department of Spain are

authentic deeds, and have the force of a deposition, because of their official character.

U. S. vs. Hanson, 19 Peters, text, 200-241;
U. S. vs. Wiggins, 14 Peters, 346;
U. S. vs. Boisdore, 11 How. text, p. 97;
U. S. vs. Percheman, 7 Peters, 51;
U. S. vs. Delespine. 15 Peters, 319 and cases cited.

From this "Espediente" or List of Grants made in the Floridas, compiled under the Royal Order of April 29th, 1822, now in the State Department has been filed in evidence a copy of the grant to Forbes & Co. found there on pages 336, *et seq.*; the same is printed on page 156-162 of the record. It will be seen by p. 88 of the record that the part of this "Espediente" which appears in the record on page 153, badly interlined, was proved and translated by the Government's witness, Carreras. In view of the interlineations apparent in the printed record, made by this witness and which do not exist in the original, we ask that the Court will exercise its right, announced in 22 Howard, 392, and 175 U. S., 696, to inspect this document in the State Department at pages 186-239-263-268-306-312-336.

It will be observed that the list was furnished by Spain in A. D. 1835. (Tr. page 162.) A translation of parts of a similar "Espediente," furnished by Spain in *1829*, appears on pages 410 to 454 of the printed record, in the case of Mitchell vs. U. S., 9 Pet., 711, the grant being printed on pages 430, *et seq.*, of that record, showing that Spain has furnished this government with two separate copies of this document.

In all of these authenticated copies Spanish authorities have certified that the date of the grant is January 10th, 1818. Hence in the absence of any explanation of the change of date we say that there is a presumption that the apparent alteration was made by authority. Even at common law an exemplified copy has been received to correct an apparent alteration made in the date of the original.

Page's Case, 5 Coke 74.

The law and usages of Spain being as stated, how could petitioners' counsel have done otherwise than to plead his clients' grant as made on January 10th? Had he pleaded it in the terms set out in the amendment offered at the hearing, it would not have been possible to make the proof required by the nature of the documents delivered by the

Spanish authorities, namely, by a "copia original" authenticated by the Notarial Custodian of the Archives.

"It must be recollected that the deed given the party is the original, though taken from the registro or protocol."

U. S. vs. King, 7 How. text, p. 888 (12-957.)

Even at common law such copies are "a recognition in the most solemn form by the Government itself of the validity of its own grant, under its own seal, and imparts absolute verity as a matter of record."

Patterson vs. Winn, 5 Peters, 241 text.

The "registro" produced by the Government being an exact duplicate of the "copia original" relied on by petitioners, except the difference noted in date, there was no variance in the proof, and consequently no new case made by the amendment ordered. The lands were identical, whether petitioners relied for proof on the authenticated copies as required by Spanish law or upon the "registro," under the rules of the common law. As said, the date was immaterial; any date was sufficient which brought the grant within the power of Spain to make, as recognized by the Act of 1860. Under the law the legal effect of the "registro" and the "copia original" was the same, and the amendment did not make a new cause of action.

Moses vs. U. S. 166 U. S. text p. 578;
Cannell vs. Milburn, 3 Cranch, (Cir. Ct) 424;
: Fed. Cases, No. 2384.

E. If there were a variance the United States could not object to it as such, for it itself introduced the registro which produced the alleged variance.

Washington vs. Hickley, 166 U. S. 521-532.
Nash vs. Towne, 5 Wall. 689-697.

And the Law is well settled that where there is no objection to a variance at the time of the introduction of the evidence, or before argument it is unavailable.

Dunstan vs. Kirkland, 3 Hughes, 641;
: Fed. Cases, 4181;
Roberts vs Graham, 6 Wall. 578.

F. There was a fair trial. The defendant was not misled and there was no surprise.

The petition plainly showed the land sought to be confirmed. It set forth all the proceedings leading up to and following the grant of that land, and not only did the

United States know exactly what was the subject matter of the claims, but *it had in its hands* the registro and knew that the papers relied upon by the petitioners represented the registro as altered, and it cannot be heard to say that the trial was not a fair one as to it, or that it was misled.

A variance does not prevent a recovery when the issues are fairly tried and the defendant is not surprised;

Salt Lake City vs. Smith, 104 Fed. 457.

In this case there was not only no surprise to the defendant, but it actually introduced into the issues and into the evidence the grant which it now contends to be variant.

The grant and the estate to be conveyed by it were the ultimate facts upon which relief was asked; the instrument by which the grant was made and the estate conveyed were evidentiary facts, and,

"Where the ultimate facts, which warrant a judgment for the plaintiff, have been clearly alleged and the issue thus tendered has been fairly tried, a variance between evidentiary facts pleaded and those proved, which has not misled or surprised the defendant, is not fatal to judgment."

Salt Lake City vs. Smith, 104 Fed. 458;
See cases cited 163 U. S. p. 477 (41-233,) also p. 479 (234.)

Of course if there was no variance, it was unnecessary to amend, but the amendment was proper.

An amendment altering the date of a demise in ejectment was allowed.

Blackwell vs. Patton, 7 Cr. 471.

And proceedings for the confirmation of these grants under the act of 1860, are analogous to ejectment.

Scull vs. United States, 98 U. S. 410.

When the defendant is not deprived of any defense upon the merits an amendment is always allowed.

Hallford vs. Blanchford, 2 Sanf. Chancery, p. 152;
Every vs. Merwin, 6 Cow. 366-367.

An amendment to prevent a variance is frequently allowed to prevent the bar of the Statute of Limitations.

McDonald vs. State, 101 Fed. 171-76, *et seq.*

2.

There is nothing in or omitted from the petition which confines the petitioners to a reliance upon the treaty of 1819 and debars them from a reliance upon the act of 1860.

Union Pac. &c. vs. Wyler, 158 U. S. 285, relied upon by the U. S., decides only that when a plaintiff places himself upon one legal position as the basis for his recovery, and thus excludes all other positions, he cannot thereafter rest upon a new ground insisted upon for the first time after the statute of limitations has run. This doctrine is not, however, applicable here for the reasons,

A. That in order that the principle may be invoked there must be an unequivocal reliance upon one ground which excludes the one subsequently relied upon, or an omission of an averment which was necessary in order to authorize a recovery upon the cause of action sought to be incorporated by amendment. There was no such reliance in, or omission from, the original petition.

B. That this is a chancery case in which the complainant is not required to state the positions upon which he relies, but merely the facts, and to ask from these facts the relief desired. In this case the petition fully stated those facts, and the amendment does not seek to change them.

C. That the test as to whether a new cause of action is sought to be introduced, is whether a recovery under the original pleading could be pleaded in bar of a distinct suit upon the amended pleading. In this case there could be no such plea of adjudication in bar.

A. There is no unequivocal reliance upon a cause of action depending solely upon the Eighth Article of the Treaty of 1819 and excluding reliance upon any other ground of recovery, nor is there any omission of facts which would support a recovery under the provisions of the Act of 1860.

The petition states the ownership of John Forbes to a certain described tract of land. It shows the person making the grant and the person to whom it was made. It sets forth all the circumstances attending its making. It gives the date of the grant and asks a certain specific relief.

The circumstances stated make out a case for recovery

under the Act of 1860, as well as under the eighth article of the treaty.

When the facts stated justify reliance upon either of two grounds, if the reliance upon one ground is to be held to exclude the other, such reliance should not only be unequivocal in its assertion, but it should be unaccompanied by any assertion of the other ground, for if there be the assertion of two grounds, it is clear that one cannot be exclusive of the other and equally clear that the subsequent reliance upon either one cannot be the introduction of a new cause of action.

There is in this case not only not an unequivocal reliance upon a right recognized and enforceable under the eighth article of the treaty, but there is a clear assertion of right under the Act of 1860.

Reliance upon a right under the eighth article is not unequivocal. There are statements that the petition to the Captain General was made by Forbes on January 5, 1818, (before January 24, 1818;) that the grant was made on January 10, 1818; that the possession of Forbes was specially protected by the eighth artiele of the treaty; that all grants made before January 24, 1818, remained confirmed by that treaty; that the grant was covered specially by the article of the treaty binding the United States to respect, acknowledge and protect the titles made by the officers of Spain; that the United States pointed out specifically the land titles in Florida, which were objected to and cancelled by Spain.

These are all the expressions of the petition which can be claimed to show that a reliance was placed on the treaty only. They do show that a reliance was placed on it, but they do not show that a reliance was placed on it only. There is no statement to that effect, nor is there any implication of it from the language used. It is merely asserted that the treaty "protected," "covered;" that it bound the United States to respect and acknowledge it; that it specifically pointed out the grants to be cancelled, etc. There was evidently an idea in the pleader's mind that the provisions of the treaty did not destroy this grant, but protected it. He distinctly points out that only the *specifically* excepted grants were cancelled- This may refer to those excepted because conditional and made after January 24, 1818, or to the three grants to Rostro, DeVargas and

Alagon. If it can refer to one or the other, then the reference is not unequivocal.

But, as we have said, there was also a reliance upon the Act of 1860. Necessarily such reliance carried with it all the benefits of the provisions of that Act, including the right to confirmation of the grant, though made after January 24, 1818, and though not protected by the treaty.

The petition is brought under the Act of 1860 and had no standing in the Court, except by virtue of that Act, and it would be absurd to hold that it deliberately intended to throw away the benefit of the Act. Instead of so doing, it relies upon the Act in several places; for instance, it points out the obligations of the Government to confirm the claim and asserts that it was "solely to fulfil such obligations that the Act of Congress *under which we act* was passed." This is a distinct reliance upon the Act. Again, it asserts that under the laws of the United States "*specially provided for cases like the present*" the "heirs are allowed to sue for the lands owned by them." There was no other law in existence except the law of 1860.

Moreover the petitioners rely on the act of 1860 and the rights conferred by it, and acknowledge that the limitation of that act applies to the petitioners' claim for they negative the existence of those things which would have prevented the court from having jurisdiction under the act. The language is:

"Your petitioners further show that at no time whatever has a report of Land Commissioners been adverse to their claim now presented, nor any report suggesting fraud, favoritism or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity," which last averment is of course not correct. We are sure however that neither the petitioners nor their counsel were aware of the suit before Judge Brackenridge.

That the petitioners further rely upon the act of 1860 is shown by the allegation, that by the law under which they proceed, they are allowed to sue the United States for the lands owned by them to recover judgment for the lands remaining in kind, *to recover land script for such land as the government has in any manner disposed of or placed beyond its control.*" The provisions italicized above is

found only in the act of 1860 and, therefore, the reference necessarily is to that act.

It would, in view of the facts which we have stated, require a great stretch to hold that the petition unequivocally relied upon the position that only by virtue of the eighth article of the treaty was this claim enforceable. In view of the great liberality of this Court towards the claims to these land titles this court will not so strain itself.

B. Even if, however, there had been an explicit statement of a reliance upon the treaty provisions this would not have prevented a reliance upon the act of 1860 permitting the confirmation of titles excluded by the treaty. This is a case in chancery, and the *facts* are all set forth; these facts justify relief either under the provisions of the treaty or in spite of the treaty, and the court, under the original petition, without amendment, could have granted relief on the latter ground.

This is well settled in chancery practice,

Oteri vs. Scalzo, 145 U. S. 589;

Jones vs. VanDoren, 130 U. S. 684-692;

Hopkins vs. Grimshaw, 165 U. S. 358.

And even though the complainant plants himself upon a wrong ground either in a statement of his conclusions as to legal positions upon which his rights depend, or in his application of that conclusion to the relief which he seeks, the court will grant relief according to the facts alleged and proved, if there be a general prayer for relief. The position is sustained by the authorities; for example:

"If a bill in equity, after alleging facts sufficient to justify a decree, incorrectly assumes additional facts to be the result of the application of the law and the necessary facts alleged, a decree is regular if based upon the necessary allegations and proofs thereof."

Allen vs. Woodruff. 96 Ill. 11.

"Where a bill in equity, filed for relief in one character, alleges facts showing the complainant to be entitled to relief in another, relief would be granted according to the allegations and the proof"

Ridgely vs. Bond, 18 Md. 433.

"Where a bill in a suit by a married woman, for relief from a judgment against her and her husband, stated facts showing plaintiff to be her husband's surety merely, and alleged her to be such, and asked the protection to which

a surety was entitled, it was proper to grant plaintiff the relief due a surety though the bill proceeded mainly on grounds other than suretyship."

Filler vs. Tyler, 91 Va. 458; 22 S. E 235.

"A court of equity, under a prayer for general relief, will extend to plaintiff such redress as will be agreeable to the case made out by the bill whether or not it is specially mentioned in the bill."

Dodge vs. Evans, 43 Miss. 570.

"A court of equity will grant no relief except on matters appearing distinctly in the bill and answer; but a bill containing a prayer for general relief and resting complainant's claim mainly on a ground not sustained by the proof, it appearing that in the bill and answer were a full history of the transaction in controversy between the parties, which disclosed other grounds of equitable relief, it was held that under the bill the court might administer such equities."

Bartee vs. Tompkins, 36 Tenn. 623.

"Under a prayer for general relief the court may grant any that the facts stated will warrant, although inconsistent with the special relief prayed."

Kelly's Heirs vs. McGuire, 15 Ark. 555.

In the case at bar the facts are fully set forth and a specific relief is asked. The facts alleged are not only consistent with, but justify the relief, even though the treaty be eliminated and the act of 1860 be alone considered, and the court under the original petition could have granted such relief.

If it were true that this was a valid grant, made at the time alleged, then it could be enforced against the United States either because coming within the terms of the treaty, or because though not coming within the treaty it came within the terms of the act of 1860.

This being so it is difficult to understand how in a court of equity even the assertion by the pleader of his belief that his rights depended upon one view of the law rather than upon another could be held to prevent the court from giving him relief according to the law and the facts as stated in the bill. If the relief could have been granted upon the original petition, either upon the theory that the petitioners' rights depended upon the treaty, or upon the theory that they depended upon the act of 1860, then an

amended petition relying upon either right would clearly not be the introduction of a new cause of action.

There is nothing in the opinion in Union Pacific, &c. vs. Wyler, 158 U. S. 286, or in the cases cited therein, relied upon by the defendant, contrary to this view. That case was one at law, where the pleader states facts and is bound by the statement; this is in equity, where the pleader states evidential facts and the court works out the relief to which he is entitled upon such facts.

Moreover, in that case the plaintiff relied in the first declaration on the common law liability of the defendant, while in the amended declaration he sought to rely on a right created by the statute of Kansas, a state *foreign* to the State of Missouri where the action was brought. There was no mention of the Kansas statute in the first declaration and the court said that in the absence of such mention there could be no reliance in a trial under the first declaration on a right created by the Kansas statute because the State of Missouri did not take notice of the statutes of Kansas, and therefore, that that statute had to be pleaded. The decision was unquestionably right and sustains us. A foreign statute is a fact to be pleaded like any other fact. If that fact be an essential of the cause of action, and in one declaration be omitted and in a subsequent one be inserted, it is clear that there is a new cause of action.

In the case at bar, however, there was no foreign statute, but an act of congress relied upon in a federal court, and it was of course not necessary for such act to have been pleaded.

Jenkins vs. Collard, 145 U. S. 560-561;
Jones vs. U. S. 137 U. S. 202, 212, 215;
U. S. vs. Reynes, 9 How. 147-148.

In the case of reliance upon a domestic public statute "it is only necessary to state facts which will appear to the Court to be affected by the statute," since they "must be noticed by the Court without their being stated in pleading."

1 Chitty on Pleading, (16 Am. Edition) p. 237.

The Supreme Court of Michigan says, "the facts alleged in the declaration were sufficient to establish a liability under the statute, without which there would be no remedy, but we see no reason for requiring the pleader to expressly refer to the statute. He must make a case, bringing the

defendant within the liability created by the statute. When this is done the defendant cannot be misled, nor can any doubt exist but that the declaration is framed under the statute."

Clarke vs. Village, etc. 88 Mich. 308;
50 N. W. 254.

Also in the case where a railroad company was declaring concerning a right-of-way which was given to it by a public statute, the Court held that "an affirmation by a railroad company that it had 'the legal right to take, hold, use and occupy a right-of-way over the land in controversy' being based upon public statute is sufficient without citing or setting out the statute in such pleadings."

Chicago, etc. vs. Porter, 72 Iowa, 426;
34 N. W. 286.

And the same rule applies when the statute is set up as a defense. The Court says: "In setting up a defense under a public statute it is not necessary either in this Court or in a Court of law that the pleader should set forth the statute in his plea, or that he should allege the existence of the statute of which the Court is bound to take notice judicially. It is sufficient for him to state the facts which are necessary to prove a case within the operation of the statute and to insist that upon those facts the plaintiff's right or remedy is at an end or never existed. The Court will then judicially notice the existence of the statute and declare its legal effect upon the case as made by the pleadings."

Bogardus vs. Trinity Church, 4 Paige Chan. 197.

Beyond this there was in the original petition a direct reliance upon the act of 1860, the petitioners expressly referring to that act as "the act of congress under which *we act*," and a reference is made to provisions, contained in that act only, allowing a recovery of script when the land sued for had been conveyed. Even though this reference was not in form, yet the petitioners having shown the existence of the act would be allowed to amend, so as to set out a reliance upon the statute more fully.

R. R. Co. vs. Nix, 68 Ga., 572.

The leading case cited and pleaded in the Wyler case (Bolton vs. Ga. Pac. R. R. Co. 83 Ga 659) was a like case where the first reliance was upon the common law right and the second upon a right created by a foreign statute.

The Court emphasizes our contention by showing that the statute was an essential *fact*, and although all other facts were stated the omission of this fact would have prevented a recovery under the statutory right set out in original declaration.

So there is nothing in the case of Sicard vs. Daves, 6 Pet. 124, that militates against the propriety of the amendment. In that case a declaration in ejectment was amended to assert a demise from a different party asserting a different title from that originally sued on, the defendants having given in evidence a junior patent and proof of settlement thereunder and holding adversely to the title brought on by amendment. This case is distinguished in Texas Ry. Co. vs. Cox, 145 U. S. 604, upon grounds similar to the facts which take the case at bar out of its effect.

In the case at bar the grant is the same, whether proved by the notarial copies setting it out as made January 10th, or by the "registro" dated February 20th, and altered to read as of January 10th. All the preliminary proceedings leading up to the grant are identical in each and the dates identical up to the order of reference for proofs. Under the act of 1860 the court is required to adjudge what the equities of the claimants are, and to do this it is proper to look at all the several parts and ceremonies necessary to complete or to prove the title, and to take them together as one act.

Yontz vs. U. S. 23 How. 495 (16-473)
Landes vs. Brant, 10 How. 372.

The legal effect of the amendment was an acceptance by petitioners of the proof of the title made by defendants. After the "registro" was put in evidence, under the law applicable to the proofs, it controlled as to the true date, and the identical grants sued for in the original petition stood proved as made, to the identical grantees as in the petition alleged but upon a day 41 days later than alleged.

C. One of the tests as to whether an amendment or offered proof introduces a new cause of action is whether, if the petitioners failed to recover upon the cause of action stated in the original petition they could afterwards sue upon the cause of action stated in the amended petition, *i. e.*, whether the decree upon the original petition against petitioners

could be pleaded as *res adjudicata* to the cause of action stated in the amended petition.

North Chicago, &c. vs. Monka, 107 Ill. 343,

If the cause of action were the same then there would be an estoppel, but if they were n t the same there would not be such estoppel.

It seems too clear for argument that there would be no defense to a plea of *res adjudicata* in the case at bar. Applying this test, the same parties, the same grant, the same statutory right, and the same opportunity to litigate every phase of the right would prevent the petitioners from successfully resisting a plea that a judgment upon the original petition was a bar to the suit upon the amended petition.

Sixth Assignment of Error.

This assignment of error (p. 133 Transcript) is as follows:

"VI. The Court erred in ordering, adjudging and decreeing that the grant by Cienfuegos, Captain General of Cuba, to John Forbes & Company, made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for the lands described, was a valid, just and binding title against the United States,"

We gather from the answers filed and from the oral argument in the District Court, the contentions of counsel to be that the decree was erroneous for the reasons following:

a. Because, as contended, the grant was annulled by the Treaty of 1819 with Spain.

b. Because, as contended, this cause is not authorized to be brought under the act of 1860.

c. Because, as contended, the grant was made without authority of Law.

d. Because, as contended, it had been rejected by the Superior Court of West Florida in A. D. 1830.

e. Because of the alteration in the date of the grant.

f. Because, as contended, the lands granted were the property of the Indians.

C. The grounds (a) and (b) will be considered under the 8th and 9th assignments of errors.

The Captain General had authority to make the grant in question.

The United States is concluded upon this point by the law and the decisions of this court. The power to grant lands in West Florida was expressly conferred on the Intendent of Cuba.

U. S. vs. Clarke, 8 Peters 452 (8-10001.)

He had power to adjudge on the equity of the claim and exercised sovereign authority as the King's deputy.

Chouteau vs. Eckhart, 2 How. p. 374, text;

United States vs. the Mayor, etc., 11 How. p. 660 text, citing the Recopilation.

The Captain General exercised not only the Supreme executive authority, but also supreme legislative and judicial power. The grant recites that it is given as an indemity and in full compensation for the cancellation of a claim duly proved, and found by the Captain General to amount to one hundred thousand dollars. By the express language of the grant it is a judicial act and adjudges to Forbes and Company an absolute title to the lands described. The term used to transfer title is not the usual word employed "concede" "I grant" or "se le concede," "let there be granted," but is a legal phrase, "applicaba y aplico," meaning that as the results of a judicial proceeding the lands are adjudged the property of the grantee. The phrase used is a law term, equivalant to our words "adjudged and decreed" used in a decree in equity. The words referred to everything prayed in the petition, and severed the land at once from the royal domain and converted it into private property.

U. S. vs. Turner, 11 How. 665;

Smith vs. United States, 10 Peters, 332.

Without the solemn judicial form of decree, if the Captain General granted the land by a complete title, it is conclusive in a suit wherein the United States by consenting to be sued has authorized the court to decide as between man and man.

Arredondo vs. U. S. 6 Peters, 711;

Keen vs. McDonough, 8 Peters, 310, (8-955.)

Mr. Justice Catron speaking of a grant without conditions says "its genuineness and proof of identity of the land would settle the question of title."

Glenn vs U. S. 13 How. 261.

The same Justice says, upon a like objection that a grant was made without authority; "it is sufficient to say that the

Governor as the King's deputy was the sole judge of the merits on which the claim is founded, and had undoubted power to reward the merits of the grantee; so this court has held in many cases."

U. S. vs. Acosta, 1 How. p. 26 text;
U. S. vs. Segui, 10 Peters, 306;
U. S. vs. Hanson, 16 Peters, 199.

(d.) The decree of Judge H. M. Breckenridge in 1830 in the Superior Court of the United States for West Florida rejecting the claim then made for a confirmation of the title evidenced by this grant is not a bar to its confirmation under the act of 1860 by the decree rendered herein on the 8th day of April, A. D. 1905, by the court below.

The contention of appellant to the contrary as set up in its answer is, that under the Act of May 23, 1828, the same parties upon the same title papers, presented "the very same claim" to the Superior Court of the Western District of Florida, and that in conformity to the rules, regulations, conditions and limitations of the Act of May 26th, 1824, the claim was rejected; that no appeal was taken and that by Statute this decree became final and is conclusive as a bar to the present proceeding. (Page 69 Tr.)

That appellant's contention is not maintainable results from the considerations,

1. That Judge Breckenridge, having determined that the grant was made after January 24th, 1818, had no jurisdiction to decide anything further.

2. That he did not decide anything beyond this.

3. That the decision that the grant was not enforceable against the United States consenting to be sued under the conditions and limitations imposed by the Act of May 26th, 1824, because made after the date fixed by the Treaty as the limit to which grants were to be recognized as valid by the United States is no bar to a decision now that Congress by the Act of 1860 has advanced the time within which the United States will recognize grants made by Spain in West

Florida from January 24, 1818, to July 21st, 1821; in other words, to a decision that the Act of 1860 has created a new right, which will be enforced. This is the doctrine both,

a. Of the general law of estoppel, and

b. Of the decisions of this court upon this Act, upon the very contention relied upon by appellants.

1. By the 6th Section of the Act of May 23, 1828, (4 Stat. at Large, p. 284) under which the Superior Court of West Florida acquired jurisdiction of the case, the rules of decision were prescribed, and all claims were required to be received and adjudicated according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the District Judge and claimants by the Act of May 26, 1824. (4 Stat. at Large, p. 52.) By Section two of this Act the court was required to determine the question of the validity of the title according to "the stipulations of any treaty and proceedings under the same."

U. S. vs. Clarke, 8 Peters, p. 467, text;
Smith vs. U. S. 10 Peters, p. 321, text;
United States vs. Wiggins, 14 Peters, text, p. 350.

"Of course in proceedings under any particular Statute the limitations prescribed by that Statute must control."

Ely vs. U. S. 171 U. S. p. 224, text;
U. S. vs. Arredondo, 6 Peters, p. 711, text.

The court can neither change nor modify the Act of Congress, and if it attempts so to do, its orders are void.

U. S. vs. Curry, 6 How. p. 112, p. 113, text.

By the Act of May 23, 1828, (4 Stat. at Large, p, 284,) the Act under which Judge Breckenridge acquired jurisdiction over the case,—that being the only section giving jurisdiction—it was declared "that nothing in this section shall be considered to authorize said Judges (District Judges) to take cognizance of any claim annulled by the said treaty or the decree ratifying the same by the King of Spain."

The Superior Court had jurisdiction to decide in the first place whether, according to the principles which the political departments of the Government had established, this was a grant which the United States had stipulated to recognize. The moment the court found that the grant fell within the class which Congress and the President had expressly refused to recognize, that moment, its juris-

diction, under the Act of 1828, to inquire into and decide upon the validity of the claim, ceased. The United States would not have been bound by its judgment had it been adverse to them, and hence cannot claim the benefit of a favorable judgment.

Moore vs. City of Albany, 98 N. Y. text, p. 408-410.

It is unnecessary to indulge in reasoning on the point, for it has been adjudicated by this Court.

Under the Act of March 3, 1891, (23 Stat. at Large, 854,) giving the Court of Private Claims authority to investigate certain classes of grants, it was provided:

"No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress."

Under this Act the Court of Private Claims took jurisdiction of the claim and decided that for the reason that Congress had already acted, it could not confirm it, but formally expressed its opinion that the title was in the claimants. The United States appealed and this Court reversing the judgment, said;

"The whole jurisdiction conferred upon that Court is to confirm or reject the claims presented to it, coming within the Act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has no jurisdiction to confirm or reject it has no authority to inquire into or pass upon the case beyond the question of jurisdiction. The primary declaration of Congress that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress" necessarily prohibits the Court from passing upon the merits of any such claims. * * * * It necessarily follows that it has no right to express any opinion upon the merits of it when the right to all the land claimed has already been decided by Congress. * * * * The Court of Private Land Claims having discovered that by an express prohibition of Congress it was without jurisdiction to confirm the land to the petitioner, the merits of the case cannot be decided by that Court, and the Court below, which undertook to pass upon the merits, must, therefore, be reversed."

U. S. vs. Baca, 184 U. S. 653.

In the case at bar the Judge found that he had no jurisdiction to confirm the claim because the grant was made

after the date named in the treaty as the limit within which the Political Department of the Government bound itself to recognize grants made by Spain. The decree was not appealed from and remained unreversed and forever bars any inquiry into the correctness of that finding. It does not bar, however, the inquiry into any other matters which it was beyond the jurisdiction of the court to decide.

2. The Judge did not attempt to decide any other matters. His opinion is replete with conviction that he knew and felt the limitation of his power and studiously kept himself within it.

At the outset of his opinion he declines to discuss anything but the question:

"Whether this be a genuine grant, within the time fixed by the treaty, because if it be not, it is useless to take into view the authority of the granting power or the regularity of the grant."

He had before him two papers, a paper purporting to be the original grant or REGISTRO, and a paper purporting to be a correct exemplification of the original grant. The former was evidently made on Feb. 20, 1818, a date after the date fixed by the treaty, and the latter purported to be a true copy of a grant made on January 10, 1818, a date before the date fixed in the treaty. To determine which was the true date of the grant, he was compelled to find which of these papers controlled the other. He found that the Registro was a true and genuine grant; that the date fixed in it was February 20, 1818, and that, therefore, he had no authority to confirm the grant, and he rejected it. He did nothing more nor less than this

In the conclusion of the opinion he epitomizes his finding and decree as follows:

"Being fully satisfied that the claimants have no lawful grant prior to the 24th of January, 1818, I feel myself bound to reject their petition. I also consider it unnecessary to consider the other points raised by the counsel."

He does consider the alterations of the REGISTRO, but only for the purpose of determining the question as to whether they were made in such a form as to make them valid, and thus to cause the instrument to speak as of the date of January 10, 1818, but having concluded that they were not saved by a *Salvado*, and were therefore ineffectual,

he declares that the grant speaks as of the original date, February 20, 1818, and was, therefore, by the express stipulations of the treaty, one which the political departments of the government refused to recognize.

The final decree is in terms a rejection, "for the reason stated in the opinion," that is, because the grant was after January 24, 1818.

Judge Breckenridge's finding and decree is as if it read, "I feel myself bound to decline to pass upon the merits of this claim from lack of jurisdiction, because I find that the grant was made after the date named in the treaty as the date within which the United States will recognize grants made by Spain in the Florida's, and the Act by which I am authorized to take cognizance of the claim requires me to decide according to the stipulations of the treaty of 1819."

3. This being his decision, obviously it is no bar to the assertion of the right now sought to be asserted. The petitioners admit that the decree adjudicated forever the question that the REGISTRO was dated February 20, 1818, and was therefore not at that time an enforceable grant, but they assert that by virtue of the validating power of the Act of 1860, a right of enforcement has been created which was not in existence in 1830, and therefore, could not have been adjudicated in that suit; that such new right would not be barred by an adjudication as to the right previously vested. This the doctrine of

A. The general law of estoppel.

A decree between the same parties about the same property is not an estoppel except as to the right therein, or which might have been therein, litigated. If a new right to the thing litigated should be afterwards acquired by one party, of course he could assert that right against the other without prevention by the estoppel of the judgment. Where the same issue was not pleaded nor tried, that fact prevents the operation of estoppel. The right, question or fact, must have been distinctly put in issue and directly determined by a court having jurisdiction.

So. Pac. Ry. vs. United States, 168 U. S. 49;
DeChambrun vs. Schermerhorn, 59 Fed. 508.

An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time, and as to the conditions then existing, and cannot

operate as an estoppel to another action, which though involving the same rights passed upon, yet is predicated upon facts which have arisen subsequent to the former adjudication.

24 Enc. Law (2nd Ed.) 777.

A judgment in a former suit between the same parties is a bar to a subsequent action, only when the point in question is the same in both. The judgment has no effect upon questions not involved in the issue and which were neither open to inquiry nor were the subject of litigation.

Norton vs. Huxley, 13 Gray, 290;
Merriam vs. Whittemore, 5 Gray, 317.

The judgment in the prior action acts as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Only upon such matters is the judgment conclusive in another action

Field J., in Cromwell vs. Sac. County, 94 U. S. 351.

As in point see the case where this court had held invalid certain bonds (155 U. S. 54,) but they were afterwards validated by Act of Congress. The court says, "The fact that this court had held the original Pima County bonds invalid does not affect the question. (Page 19.) * * * The judgment in that case was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing."

Utter vs. Franklin, 172 U. S., p. 424.

They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given.

In the case at bar the right upon which we now stand did not then exist and could not have been litigated. This matter is, however, foreclosed by

B. Decisions of this court upon this Statute directly in point.

In one case the claim had been rejected by the District Court and that rejection affirmed by the Supreme Court. After the passage of the Act of 1860, suit was again brought upon the claim. It was entertained by the courts and con-

firmed, this Court commenting upon the fact that it had, before the Act of 1860, been rejected by the Court.

U. S. vs. Lynde, 11 Wall. 632.

This was directly decided as shown by the dissent of Justice Clifford, he holding that the "Act of Congress in question did not confirm any grant previously adjudged void by the Federal Courts in pursuance of the prior Act of Congress conferring jurisdiction to hear and determine the controversy."

The case of D'Auterive was decided against claimant in 10 How. 609, because made after the treaty of San Ildefonso and under the Statutes thereafter made the grant was not recognized as one which Spain had the right to make at the time when it was made, and again decided against him in 15 How. 14. Still, however, when the same case came before the court after the passage of the Act of 1860 it took cognizance of it, and without recognizing any bar from the former adjudication proceeded to investigate the enforceability of the grant under the Act of 1860.

Dauterive vs. United States, 101 U. S. 700.

These decisions are under the Act of 1860 and are conclusive. Although the lands did not lie to the east of the Perdido, necessarily the principles of the estoppel would be the same as to any of the classes of land covered by the Act.

SPECIALLY AS TO FLORIDA LANDS, however, this court has declared that the purpose of the act was to relieve claimants, even though the courts had already rejected the claim, because required to do so by the terms of the treaty. The court is dealing with Florida Grants, and the contention that they were annulled by the 8th article of the Treaty and is applying the Act of 1860 to them and its language is, "The Act of 1860 was intended to give relief to a large class of grantees of former Governments whose claims had been rejected by different Boards of Commissioners and by the Courts, under the strict construction of the treaties, which prior laws had required."

U. S. vs. Morant, 123 U. S. p. 342.

The meaning of this as applied to the case then in question and as to this case is, that the treaty of 1819 and the Laws under it had caused the rejection by Board of Commissioners, and by Courts of grants because made

after January 24th, 1818, but the Act of 1860 was intended to give relief to those classes of claimants against whom decisions had been rendered. This is conclusive of this branch of the case.

(e.) The title evidenced by the registro produced by the United States, proved and admitted to be the original petition presented by Forbes, with the proof had thereupon, and the finding and decree thereon by the Captain General of Cuba was not affected by the alteration of dates therein.

That the registro was signed by Cienfuegos on February 20, 1818, and afterwards altered to bear date January 10, 1818, and the notarial copy of the order of possession given by Masot altered from the original date of March 23, 1818, to January 23, 1818, is too clear for dispute.

In the discussion of this question it is well that the Court should have an exact understanding of what was in evidence in the Court below as the grant and its alterations, and to that end the members of the Court are asked to inspect the original "Expediente" sent up by order of the District Judge, because the printer has failed to reproduce the originals on pages 134 to 142 of the record. An examination of the Spanish originals will establish that each sheet, both of the "registro" and the attached copy, including the original petition of Mitchell for such copy and its accompanied endorsements, is upon official paper for the years 1818-1819; that the stamp, including the King's seal is at the top of pages 1, 4, 5, 8, 9, 11, 13, 16, 17, 20, 21 and 24 of the "registro," as necessitated by the use of sheets and half sheets of official paper; that each proceeding follows in regular sequence from page 1 to page 23, where the "registro" ends; that to the "registro" there has been attached, beginning at page 25, the proceedings taken and made for the preservation of an authentic copy of the order of possession given the grantees by Governor Masot in March, 1818, which date has been altered to January.

In some manner, doubtless because the printer did not understand its importance, the record has been so printed as to fail to show the paging or arrangement of the original

papers, has misplaced the official seals and wholly omits to indicate the blank pages, 23 and 24, which follow the "registro;" and the facts that the endorsement of the Captain General upon Mitchell's petition is made upon the margin, and that this copy is verified by the official seal of the College of Notaries. This manner of presenting the Spanish copy of the title papers changes their whole character, so that it is necessary to ask the Court to rely upon the originals sent up from the District Court, and not upon the confused copy as it appears in the printed record.

The attention of the court is directed to what is the Registro in the case. There can be no question that the "Registro" ends with page 23 of the original papers sent up by order of Judge Locke, the last words being "en dho, dia lo hize saber A D, Juan Forbes doy fe Mendez," printed on page 141 of the record. The remainder of page 23 and all of page 24 is blank, while in all other parts of the "Registro" each instrument or proceeding, even when made by another officer, has been written on the same sheet, without any blank pages. It needs no argument to establish that the petition of Colin Mitchell for a copy of the order of possession and that copy which are attached to the Registro as a part of the "expediente," are no part of the registro or judicial record divesting title out of the King and vesting title in the firm of Forbes & Company.

The papers other than the registro consist of a petition presented in December to be furnished copies of an original order dated the March previous, which original the petitioner had in his possession and which was returned to him. Although this petition and the proceedings had thereon, (pages 25, 26, 27, 28 and 29 of the document sent this Court by the District Judge,) have been by some person unknown attached to the *registro*, from their very nature, as copies, they can be no part of it. The *registro*, pages 1 to 23, inclusive, of the original document sent to the Court, constitute a *titulo en forma*, gives the property to the grantees, and is the complete and perfect evidence of their title from its date.

United States vs. King, 7 How., text, 890.

It is probable that the petition of Mitchell and the authenticated copy of Masot's order were attached to the "registro" when the documents were delivered to Commis-

sioner R. K. Call. The date 1829 on the cover of the document confirms this supposition.

It may be true as held by Mr. Call, the special commissioner to receive the archives and of counsel for the government in the former suit upon this claim, that the alterations in the registro were made for the purpose of exempting this grant from the provisions of the 8th article of the treaty, and this alteration was unauthorized and fraudulent. This, however, does not affect the title conveyed by the decree of Cienfuegos, nor make the registro inadmissible as evidence of title, because,

1. By the Civil Law the alteration itself was of no effect, and the validity or enforceability of the instrument was not affected.

2. If the test be by the common law, still the rights of the petitioners to rely on the title evidenced by the Registro is not affected by the alterations, because,

a. It is not shown, nor is there any presumption that they were made by the Grantees or by their procurement.

b. Even if made by them they were made after the title had been vested, and therefore cannot affect such title, nor prevent the use of the instrument as evidence thereof.

1. It is difficult for us at this lapse of time to be always certain of what the Spanish Law was and we are compelled therefore to be very careful of how we reject Spanish titles for Acts done while Spain had possession and when their validity depends upon Spanish Law.

U. S. vs Perchman, 7 Peters, 51.

In this instance, however, we find the Spanish Law on the subject stated as follows:

"The document will not then be null and void because of the alterations not noted as correct, or words which are found in it, because it cannot, nor should be arbitrary with the Notary, nor any other person to destroy thus the effect of an authenticated document to the prejudice of those interested. The alterations will be on the contrary, the ones which will be null and void. The additions, obliterations, erasures and corrections will themselves be as non-existing, and the words illegally obliterated or erased or corrected will be considered as existing, and their (the additions, etc.,) operation will always be entirely destroyed if it can be discovered from the tenor or by the interpreta-

tion or combination with what precedes or follows, the original meaning can be determined.

Escriche's Dictionary of Jurisprudence, pp. 888-889.

If the above be the law, then no effect whatever is to be attributed to the alterations and the Registro is intact and the title conveyed by it is also *intact*, as if no alteration had been made.

2. If, however, we were ignorant of the civil law covering the point and assume that it was governed by the common law, the same result is reached.

A. The presumption in favor of innocence applies in the case of alterations of instruments and prevail unless there be countervailing facts or presumptions.

Speake vs. U. S., 9 Cranch, 37.

There can be no doubt that as directed in the grant the Registro was deposited and kept in the King's Archives until delivered to the agent of the United States. That such was the law of Spain the Court will judicially notice.

6 Peters, 722: 9 Howard 167, 663;

17 Howard, 442-557 (15-245,) 98 U. S, 428, (25-252) (31-457.)

The alterations appearing therein must therefore have been made by an authorized Spanish official as an official act or by a stranger, and in the latter case they are a mere spoliation or mutilation of the document.

In law, therefore, such alteration, if the same was in fact unauthorized by the Spanish officials, affected no change in the legal operation of the document, the original writing remaining legible as was decided by Judge Brackenridge and as this court will see on inspection.

1 Green Ev. Sec. 566, cases cited note 1;

Henfee vs. Bromley, 6 East, 309, 2 Smith 400.

The doctrine that a material alteration made by a stranger avoids the instrument has never been introduced into the jurisprudence of this Country. Even in England if the spoliation takes place when the instrument is out of the custody of the party claiming under it, his rights are not impaired thereby. Note to Masters vs. Miller, 2 Smith, 9th Am. Ed.

Judge Story in United States vs. Spaulding, 2 Mason, 478, says, as to the doctrine that a material alteration avoids the instrument though made by a stranger, that it is repugant to common sense and justice; and Lord Denman,

Chief Justice, in Davidson vs. Cooper, 13 M. & W. 343, says "the strictness of the rule as laid down in Pigot's case can only be explained on a principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state."

The same rule has always applied to a record, as to which the law is declared to be, that a record rased, if legible, remains a good record notwithstanding the rasure.

Jacob's Law Dictionary, Vol. 5, p. 398, (edition 1811.)

The same rule is applied to wills, which being in the custody of the testator, partake more of the "Registro" under the Spanish Law than ordinary title deeds under the English system. The court has always granted probate of wills in their original form where the will contains an unexplained alteration, interlineation or erasure.

2 Enc. Law, p 265, (2 Edition;)
1 Taylor on Evidence, Section 164.

Section 1582 of the Civil Code of Louisiana evidencing the civil law to the same effect.

Unauthorized alterations in a will have no effect if the original words can be shown.

Malin vs. Malin, 1 Wend., 625, text, page 659.
See cases cited, 2 Enc. Law, p. 268, especially Doane vs. Hadlock, 42 Me. 72.

Unquestionably a presumption arises from their interest that the grantees procured or were concerned in the alteration of the dates in the Registro, and copy of Masot's order attached thereto. This presumption is, however, met by one fact and conclusively overcome by another—the fact of the ignorance of the petitioners in the suit before Judge Brackenridge of the existence of the alterations, and the fact that the grantees and their heirs had never had possession of, or access to, the "registro" and copy of Masot's order as altered.

Counsel for petitioners before Judge Brackenridge secured a subpœna *duces tecum* to procure the production of the original of the grant and gave notice of their reliance upon the same to establish their title, (pages 164 and 190 Tr.) Upon the production of the original the petitioners were taken by surprise at the alterations apparent, and repudiated it. (Opinion of Brackenridge, Judge, page 80 Tr.)

(Exhibit No. 4, page 466 of record transmitted, omitted in printing.)

Forbes was dead at the date of the former suit but it can scarcely be conceived that his partners would have been ignorant of the fact if Forbes had known that the dates in the registro and copy attached had been altered. Their conduct is conclusive that they were ignorant of such alterations. The registro being genuine in all respects save the alterations of dates, and continuously in the custody of the officer of the King, the burden is clearly upon the appellant to establish that the alterations were unauthorized.

United States vs. Linn, 1 How. 104-113, text.

The dignity and character of a registro is such that the grantees therein cannot be called upon to explain even apparent irregularities or improprieties therein.

United States vs. Marshall Silver Mining Co. 129 U. S., p. 579-589, (32-738.)

United States vs. Stinson, 197 U. S., text, p, 204.

Documents furnished by the proper Spanish officer ought to be regarded as genuine, unless impeached by other testimony.

Chief Justice Taney, U. S. vs King, 3 How. text, 786.

We think the burden of accounting for the alterations in the report of the Committee cannot justly be thrown upon the claimants. They produce the certificate of the approval authenticated. The genuineness of this document is not disputed, or if disputed is conclusively proved. That the report of the committee with the resolution of approval attached, which is preserved in the archives, should contain interlineations, is a circumstance which might very well happen, and yet the claimants have no means to explain it. If the certificate of approval given to the party interested be genuine, it must be received as legal and conclusive evidence of the fact, unless other circumstances show that it was improperly furnished through fraud or mistake.

United States vs. Bernal, 1 Hoffman's Repts., text, p. 62.

A patent for land may only be impeached by actual and positive fraud in fact committed by the person who obtained it.

Stringer vs. Young, 3 Peters, text, p. 341.

But conclusive against the alteration of the dates in the registro and in the notarial copy attached thereto by procurement of the grantee, is the fact that the expediente embracing both documents was a part of the archives of the Spanish Government and remained as such until it passed into the hands of the United States from R. K. Call, upon procurement from the archives of Cuba. (Page 191 Tr.)

Mitchell vs. United States, 9 Peters, text, p. 732.
United States vs. Wiggins, 14 Peters, 345-346, text.

The want of possession of either the registro or the notarial copy of Masot's order attached thereto by the persons interested in the alteration, rebuts the presumption arising from the fact that such interest prompted the alterations.

Opinion Judge Brackenridge.

See also United States vs. Galbraith, 2 Black, 394, where the court comments upon the case of United States vs. West, 27 How. 315, and lays the strongest stress upon the absence in the West case of the instrument from the possession of the claimant, while in the Galbraith case "the certificate of approval and the title in form both came from the hands of the claimants." (17-450.)

It is universally held that the alteration of an instrument in official custody will not prejudice the right of a claimant under the instrument.

Friedman vs. Shamblin, 117 Ala. 454;
United States vs. Hatch, 1 Paine, 336;
DeVoy vs. the Mayor, 35 Barb., 264;
People vs. Minck, 21 N. Y. 539;
Casoni vs. Jerome, 58 N. Y. text, 321;
See U. S. vs. Linn, 1 How. 111–113–115.

The presumption is very strong that the alterations were made by the Spanish officials in charge of the archives and the REGISTRO.

The proceedings were begun on the 5th of January, 1818, before the date finally fixed in the treaty as the time limit for the recognition of grants made, and were completed only twenty-seven days after such limit. Forbes and his house were evidently high in favor with the Spanish officials.

U. S. vs. Mitchell, 9 Peters, 726-727.

And such officials could have been actuated by a threefold motive in making the alteration; a desire to do what

they considered to be justice in making effective a grant which was so near completion at the arbitrary date fixed by the treaty; a desire to benefit Forbes and Company and a general desire to relinquish as little property to the United States as possible. The proposal by Spain for the cession did not take place until October 24th, 1818.

See Executive Papers, Vol. 1, Sess. 16 Congress, Doc. 2, p. 25;

See Letter Sec. State, Doc. 274, 1 Sess. 22 Congress, p. 12.

Mr. Livingston writes: "The first formal and written proposition (for the cession of the Floridas) came from Spain through their minister in a note inclosed in his letter of the 24th of October of that year" (1818.)

The fixing of the day beyond which grants would not be valid was not done until later and long after this grant was complete, and we can well imagine the chagrin of the Spanish officials when, in the slow course of transmission of news of that day, they first learned that an arbitrary date had been fixed and that the date excluded from recognition by the United States this very large and important grant, made as an indemnity for claims against the government, begun and completed in good faith, and without any suspicion that there would be any subsequent declaration of invalidity, and it was but a step to the alteration of the grant by changes which they thought justice demanded and which would never be known.

It must not be forgotten that Cienfuegos made the grant in settlement of pecuniary obligations of Spain to Forbes & Company. It was a payment in the only manner Spain could pay for a claim against the Royal Treasury, adjudged to be valid, and the grant recites its receipt in full compensation, and thereby "the demands of said firm for indemnity cancelled."

The view that these alterations were made by Spanish officials and were presumed to be regular, is much strengthened by the fact that high Spanish officials, knowing of the alteration, several times reported the grant as a valid grant and failed to believe that the alterations were made by persons under such circumstances as to destroy the grant. Thus, on the 19th day of December, 1818, the Notary, before whom the grant was made, furnished a copy of the document, as of the date of January 10th, 1818, with

no mention of the alteration or amendment of the date of the grant. In his report of the 20th of August, 1824, Vincence Pintado, Surveyor General, reports under date of Oct. 31st, 1823, that on Sept, 15, 1819, he made a plat of these lands by order of the Captain General, of date July 19th, 1819, and he asked for data which were communicated to him through these documents In this report he fixes the date of the grant as Jan. 10th, 1818. By this report made upon the order of the King, of April 29th, 1822, to furnish a list of all the grants made in the Floridas, he stated that he was shown the original or primitive record, that is to say, the REGISTRO, now before this court, and made an authenticated copy of it. (Page 152 Tr.) He reports the grant to have been made January 10th, 1818. A copy of the grant showing it to have been made Jan. 10th, 1818, was furnished by the Govermment of Spain to the United States in 1829, (filed in evidence in Mitchell vs. U. S., 7 Pet., 717,) and another, showing the same date, in 1835. A copy of the grant certified by the Government Notary was presented to the Land Commissioners in 1824 (4 Am. St. Pap. 169, *et. seq.*) A copy is also in 2 White's Recopilacion, p. 350, *et. seq.* (156 to 163 and 86 and 181 Tr.) We have thus four recognitions by high Spanish authority, that while the grant was altered it was done by officials and others presumed to have authority and thus to give official character to it. This furnishes the strongest evidence that no private individuals were supposed by these officials to have made the alterations. If done by or with consent of the Spanish officials, claimants are not prejudiced. The Court is not authorized to pronounce a forfeiture for anything done or omitted by Spanish officials.

Hornsby vs. United States, 10 Wall, 224 (19-904.)

The salvado attached to the authenticated copy of Masot's order, (page 29 of the original documents sent to this Court by the District Judge.) shows that the alteration of date from February to January of the grant was validated or attempted to be validated by some Spanish officials having the custody of the papers, as no others had access to them. There appears there this entry; "Entre rengs—a diez Em do Enero–vale." Properly translated this reads "the foregoing interlineation noted—the alteration to the 10th of January—is valid." The Spanish words on p. 101 and

their translation on page 190 of the Record are so badly printed as to make them unintelligible.

It is claimed that this entry is there without authority. Because the "Salvado" is in a different handwriting and in different colored ink does not establish that it was unauthorized. It would not have been likely to have been placed there until some months after the copy was furnished Mitchell, if, as may be presumed, the alterations were made after the Treaty was ratified.

As between Spain and Forbes & Company, there is no doubt of the authority of the King's officers to consent to the antedating of the title and ratifying it.

Speake vs. United States, 9 Cranch, 28.

That there has been such a recognition of the validity of the alteration as in law amounts to a ratification, is shown by the foregoing official proceedings

Considering the acts of a Spanish official claimed to have been unauthorized by law, this court says: "all favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary is shown, that a public officer acted according to the law and his instructions. The government accepted Soto's acts and it does not appear that there was ever any attempt made to revoke or annul his proceedings or to assert a forfeiture for the cause now insisted on," holding it strong evidence in favor of an official act being valid that the protocol evidencing it, remains in the public archives, unrepudiated by the government.

Gonzales vs. Ross, 120 U. S., 605, (30-807;)

U. S. vs. King, 3 How. text, p. 786.

Such ratification is as effective as a new execution.

Penny vs. Corwithe, 18 John, text, 501.

Prouty vs. Wilson, 123 Mass. 297;

Stewart vs. Port Huron, N. P. K., 40 Mich., 348.

As an illustration of Spain's feeling that an indemnity should be made for the invalid grants it will be remembered that de Vargas, Rostro and Alagon, were all compensated largely by the King of Spain for the grants which were specifically annulled by the treaty of 1819.

B. But even if the alterations had been fraudulently made by procurement of the grantees, after the title had become vested in them, they would not have affected the title already vested. The doctrine seems to be settled that

the fraudulent alteration of an instrument does not affect rights already vested under it, but will only affect those which are executory or lie in action. Thus, in the case of a deed to real estate, an alteration after the title has vested will not divest the title already vested, but will prevent any action upon the covenants therein.

Mallory vs. Stodder, 6 Ala., 861;
Lewis vs. Payn, 8 Cow., 71;
Morgan vs Elam, 4 Yerger, 411, *et. seq.*;
2 Am. and Eng. Enc. of L. (2 Ed.) p. 196;
Doe vs. Hurst, 3 Starkie, p. 60, E. C. L., p. 162;
Woods vs. Hilderbrand, 46 Mo., 284;
1 Greenleaf Ev. Sec. 568, citations;
Jackson vs. Chase, 2 John, 84-87;
Hatch vs. Hatch, 9 Mass., 307;
Dana vs. Newhall, 13 Mass., 498; 138 U. S., 21;

And while the instrument could not be used as evidence of such executory or actionable rights, yet it can be used as evidence of those which have become executed.

Ala. State vs. Thompson, *et. al.*, 104 Ala., p. 570;
16 So. Rep. p. 449;
Insurance Co. vs. Fitzgerald, 16 Q. B. p. 450;
Davison vs. Cooper, 11 M. and W. p. 778-800;
Burnett vs. McCluey, 78 Mo., p. 676;
Chessman vs. Whittemore, 23 Pick., 231;
10 Wall., 36, 2 Ed. Smith L. C. 1, 1 Whart. Ev. 629,
158 U. S., p. 27;
Jackson vs. Gould, 7 Wend. p. 364;
North vs. Henneberry, 44 Wis., p. 306;
Lewis vs. Payn, 8 Cow., p. 71;
Alexander vs. Hickox, 34 Mo., 496;
1 Greenleaf on Evidence, Sec. 568 and citations;
2 Am. and Eng. Enc. (2 Ed) p. 204-188 note.

This doctrine is also confirmed by the following cases:

Patterson vs. McClay, L. R., 10 Ex. p. 360;
Ward vs. Wesley, 5 H. and N. p. 87;
Hutchins vs. Scott, 2 M. and W. p. 815-816;
Sutton vs. Toome, B. and C. p. 816; 14 E. C. L. p. 66;
Herrick vs Malin, 22 Wend., 388.

In this case there can be no doubt that all alterations were made *after the title had vested.* There could be no reason for the alterations until it became certain that the grants made before January 24th, 1818, would not be re-

cognized, and this was arrived at only after February 19th, 1819, when the treaty was signed. Berore that date it was not settled even between the negotiators, and the project for the treaty, submitted by de Onis for Spain, containing the stipulations as to parts, was on the 9th of February, 1819.

1 Ex. Papers, 1 Session, 16 Congress, Doc. No. 2, p. 34, read in Congress Dec. 7, 1819.

There is conclusive evidence that the alterations took place after Dec. 18, 1818, for on that day a copy of the order of Masot of March 23rd, 1818, was attached to the REGISTRO. Such copy now, however, shows the date March 23, 1818, to have been altered to read "January 23rd, 1818." If the Registro had been altered before the date when the copy of the order of possession was made to be attached such order would have been written to correspond, and, thus a clean copy with the date of January 23, 1818, and without any alteration whatever, would now appear as attached. But the copy attached was originally written (on December 18th, 1818, when attached) with the date March 23rd, 1818, and was, therefore, *after the time when it was written*, altered to show the date January 23rd, 1818. Of course the Registro was altered at the same time. Besides this, the alteration was necessarily after the 23rd of March, 1818, because if it had been at or before that time, then the order of Masot would have borne date January 23rd, 1818, and not have had to be altered so as to bear that date.

But long before this date the title had vested in the grantee.

On Feb. 20th, 1818, a year before the date of the treaty, (lacking one day,) the REGISTRO had been signed and deposited in the archives. It contained an adjudication of the claim of Forbes and relinquishment of his rights of an indemnity from Spain, and as we understand the civil law, vested the title in him at once. We quote: "Some stress is placed by counsel for appellants upon the facts that there is no proof as they claim of a delivery of the grant as alleged in the complaint, and we deem it proper to say what we have to say upon that subject in this connection. We held that the grant in this case was made in a manner not fatally repugnant to the regulations of 1789. Under these regulations there could be no delivery of the grant

as entered in Book A. The only thing to be delivered was a copy, or if you please, an alias original, which was not given to the grantee in the sense in which we speak of a private conveyance. It was not delivered to him because its delivery was necessary in order to give effect to the grant and vest in him the title to the lot. It was given to him merely in testimony of his right under the grant. We do not understand that the doctrine of delivery as applied by us to private conveyances, has any application to grants made by the government either under the Mexican system or our own. We so intimated in Downer vs. Smith, *supra*. We understand that the title under the grant vests the moment it has received the stamp of the last act required to completely authenticate the instrument, and that a delivery is not necessary.

(Marbury vs. Madison, 1 Cranch, 137;
Lott vs. Proudhomme, 3 Rob. La.. 293;
Lavergne's hejrs vs. Elkins heirs, 17 La. 226;")
Donner vs. Palmer, 31 Cal., p. 513.

Though an order of possession is sometimes made and executed, yet it is the grant which confers the title.

"The plaintiff complains that the Judge laid down an erroneous rule in charging that if the description contained in the petition and grant differed from that contained in the act of possession the former must prevail because it was the grant which conferred the title. We think that there is no error in this charge."

Pinkerton vs. Ledroux, 119 U. S., p. 254;
U. S. vs. Clark, 8 Pet. pp. 436-468;
U. S. vs. King, 7 How. text, p. 890.

That no delivery was necessary was also the rule of the common law. A patent or conveyance from the government confers title without delivery. The title vests in the grantee when the government officials have done all they can do except to deliver the evidence of the Grant. Thereafter it is held for the grantee.

U. S. vs. Schurz, 102 U. S , p. 378.

This court in that case refers approvingly to the very able opiniou of Judge Field, in which he says: "In case of a private deed it is essential that the grantor should part with his possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed. With the close of the record the power of the

officers of the government over the instrument is gone. Whether it thereafter remains in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected."

LeRoy vs. Jamison, 3 Sawy. p. 369;
8271 Fed. Cases.

The granting words used by Cienfuegos "aplicaba y aplico" clearly establish that the title vested when Forbes' petition was judicially approved and granted. If further requirement, however, was needed, it was fulfilled in the act of the grantee in taking possession, and the evidence is that this took place in 1818, immediately after the return of the order of possession made by Governor Masot.

Testimony of Carlos Evans, 4 Am. State Papers, p. 172.

Masot ceased to be governor in May, 1818.

White's Recopilacion, Vol. 2, p. 256.

The ineffectiveness of the altaration in this case to destroy the grant and the title thereby created, seems to be fully shown in the case of

United States vs. West, 22 How. 315.

In that case this court decided that the alterations made by the Spanish officials enlarging or extending the grant did not invalidate the grant as to the property actually granted. Followed in U. S. vs. Juarez, 26 Fed. Cases, 688. This case is not overruled nor is its authority impinged upon by the case of

United States vs. Galbraith, 2 Black, p. 394,

in which it was commented upon and explained, because in the latter case the whole grant was fabricated at a date when the authorities had no power to make it, and it was antedated so as to cause it to appear to have been made when they had the power.

The West case, *supra*, is exactly the case which was before Judge Brackenridge upon the grant in controversy in its then status. As the case then stood the grant was antedated so as to make it appear to have been made before January 24, 1818, and was rejected because it was, in fact, made after that date. As the grant now stands, however, under the act of 1860, the grant is as effective whether made after or before January 24, 1818, if made before the cession, and therefore a finding that it was made on February 20th, and after the treaty date but antedated

so as to appear to come before the treaty date, does not affect its validity, unless the law be that an alteration necessarily avoids the instrument altered, a contention which we think we have met and disposed of.

There is another ground upon which it should be held that the alteration made in the date of the "registro" should not prejudice the title of the grantees, and that is that under Spanish law, title to lands might be made by parol. No writing was necessary for passing the title, apart from official regulations tending to the order administration of the land office of the government.

Law 6, Title 5, Partida 5,
Law 4, Title 4, Partida 4,
Law 2, Title 11, Partida 5,
1 Sala Illustracion Derecho Real 271;
2 Tapias Febrero Novissimo, Sec. 3, p. 134, (Paris Ed. 1855;)
Long vs. Dollarhide Co., 24 Cal., 218;
Mr. Justice Baldwin in Strother vs. Lucas, text, p. 450, *et. ante.*

If the Captain General might make an effective verbal grant of these lands to Forbes & Company, certain it is that an alteration in the date of his written grant could not destroy the effect thereof.

(g.) No right of Indian occupancy prevented the Spanish Captain General from making a valid grant of the lands to Forbes & Co.

1. The answer sets up the occupancy of the Indians, a general replication denies it. No evidence has been taken on the point and no proof appears in the record. Therefore of course the question is not in the case.

2. If, however, it had been proven that the Indians occupied the land at the time of the grant, this would not invalidate it. The fee was in the Spanish Crown, subject to the right of occupancy by the Indians, and when that occupancy ceased the title became united to the possession.

"Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed on the governors under Great Britain; both made grants without regard to the land being in the possession of the Indians; they were valid to

pass the right of the crown, subject to their right of occupancy; when that ceased, either by grant to individuals with the consent of the local governors, by cession to the crown, or the abandonment by the Indians, the title of the grantee became complete."

U S. vs. Fernandez. 10 Pet., 303;
Mitchell vs. U. S , 9 Pet., p. 711;
Fletcher vs. Peck, 6 Cranch, 143;
Reports of Coms. Vol. 4, Am. St. Papers, p. 93, (Duff Green Ed;)
2 White's Recopilacion, p. 324.

Seventh and Eighth Assignments of Error.

These assignments of error (p. 133, Tr.) are,

"7. The Court erred in decreeing that the petitioners herein were entitled to receive from the United States a patent for all the described tract of land not sold or otherwise disposed of by the United States, and entitled to enter any of the public lands of the United States, liable to entry at one dollar and a quarter per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the described tract, according to the 6th Section of the Act of Congress approved June 22nd, 1860."

"8. The court erred in deciding that a claim for lands in West Florida, by virtue of a grant made by the Captain General of Cuba on the 20th day of February, 1818, could be confirmed under the provisions of the act of Congress approved June 22nd, 1860."

They both raise the same contention. That is, that a grant of land made on February 20, 1818, cannot be confirmed under the provisions of the act of June 22nd, 1860.

We answer with confidence:

Even if both Spain and the United States stipulated by the 8th article of the treaty of 1819 that perfect titles made after January 24, 1819, should not be recognized by the United States, the act of 1860 removed the bar created by the treaty and permitted the

enforcement of such grants in the United States Courts within the time limited by the act, as extended by the subsequent act of 1872.

1st. Congress had power to remove the bar and make the grant effectual, though theretofore made ineffectual.

2nd. The proper construction of the act shows that it did so do. Such construction results,

A. From the language of the act and a comparison of it with former acts, and the decisions of this court, indicating the liberal policy of the United States with respect to Spanish grants, and the enlargement of such policy, and

B. From the decisions of this Court directly upon this act, construing it as we contend.

1. Of course, the congress had power to declare that the grants that it had theretofore declared to be null should no longer be so, but should be entirely operative. If they were perfected before the treaty they were null only by virtue of the arbitrary will of the two treaty making parties. This invalidation of them was solely a matter of policy on the part of the United States in order to protect itself against the imposition which it feared, if it recognized grants made after Spain had made a proposition for a cession, to-wit, October 24th, 1818, but in the treaty stated to be Jan. 24th, 1818, and after it presumedly became indifferent as to the number or extent of the grants being made by it. Being thus a protection to the United States it could, of course, waive that protection.

If the land had not become effectually the land of private grantees before the cession, it then became the land of the United States, and being so, that Government could dispose of it as it saw fit. These things seem truisms, unless it should be held that the treaty was a compact between the two nations and that the United States could not alter it in any way. On that point it suffices to say that a treaty can be abrogated by an act of Congress inconsistent with it, or directly repealing it, and in such a case the treaty, or the

repealed portion of it ceases to exist, and the act is the operative law.

Headmoney Cases, 112 U. S., 580; 130 U. S , 238;
Whitney vs. Robertson, 124 U. S., 190, 196; 143 U. S., 570;
: 130 U. S., 581, (32-1068:)

This being so, the only question in any case is the question of construction, *i. e.*, whether Congress intended to displace the treaty provision and substitute therefor the statutory will. Applied in this case the question is, whether a proper construction of the Act of 1860 necessitates a holding that it intended to depart from the earlier policy of the United States,—a refusal to recognize Spanish Grants in Florida made after Jan. 24th, 1818, and before the effectuation of the possession of the United States, as enforceable grants,—or whether it intended that such grants should be put on the same plane and subject to the same defences only as those made prior to that date.

That the latter was the design can be clearly shown;

2. It results from

A. The language of the act;

B. The purpose of the act, and is conclusively demonstrated by

C. Decisions of this Court as to lands embraced within the act, but not governed by the exception in the treaty of 1819, and

D. Decisions of this Court directly upon the effect of the act upon lands, the title to which was by the eighth article of that treaty excluded from recognition.

A. The first canon of construction of an act is to find what an act says; if that is clear and unambiguous that must control. This act is clear in its inclusive provisions and in its exclusive provisions. In the former it includes lands having the status of those here in litigation, and in the latter it shows under what circumstances only such lands are to be excluded from the operation of the act.

The first section provides for the presentation to certain Commissioners of claims for "*any lands* lying within the States of Florida, Louisiana, or Missouri, by virtue of grants, &c., * * * * bearing date prior to the cession to the United States of the territory out of which said states were formed, or during the period when any such government claimed sovereignty or had actual possession of any such

district or territory in which the lands so claimed was situated."

This includes *all lands* held as provided. It excludes none by reason of the time when the right to them accrued, provided that such right accrued before the cession or transfer of actual possession. The language is as broad as possible and must be taken in its full breadth, unless there be controlling reasons to the contrary. Instead of such reasons there are, as we shall show, conclusive reasons why the act should be construed as we contend.

The eleventh section provides for presentation to the Court of "*any case of such* a claim to lands as herein before in the first section of this act mentioned." "Where such lands are claimed by complete grant or cession * * * prior to the cession to the United States of the territory in which said lands are included," etc. This language is equally broad and includes all perfected grants, etc., provided they were not made after the cession or transfer of possession.

In neither of these sections is there any hint that there was to be found a meaning which limited the grants covered by them to those made before Jan. 24th, 1818. Upon the contrary the language is directly antagonistic to such a construction, for it expressly fixes a later date as a limit of time in which grants cognizable, under the act, could have been made. The cession, of course, could not be before the date of the treaty, to-wit, Feb. 19, 1819, but if the act could be construed as defendant contends this provision would have read thus: "The Court shall decide the claim valid or invalid if the grant was made before Feb. 19th, 1819, provided that it was made before Jan. 24th, 1819." The contradiction of terms is clear.

The only words of any exclusion also indicate that all grants except those excluded by the proviso of the third subdivision of the third section are to be within the benefit of the act. (This proviso and not the whole section as would seem from the language of the eleventh section is incorporated by reference into the eleventh section.

U. S. vs. Scull, 98 U. S., 410;
U. S. vs. Morant, 123 U. S., 335;
U. S. vs. Clamorgan, 101 U. S., 822, (25-837.)

The converse of the rule "*expressio unius*," etc., is also true, *i. e.*, that the naming of specific things as excluded

will raise a construction including all other things which are not embraced in the specific exclusion.

This is why the act excludes from the "*all lands*" covered by complete grant or concession only those which had been rejected by the Board of Land Commissioners, or other public officers as having been fraudulent, or procured or maintained by fraudulent means, or which had been twice rejected on their merits by previous Boards of Commissioners. If the grant was complete and had not been rejected by the tribunals and for the causes mentioned in the proviso, then it is cognizable by the Court under this act without regard to the time when made, if made within the time fixed in the act.

B. The purpose of the act can be clearly demonstrated to have been to provide for the investigation of grants which had not theretofore been recognized as valid by the United States, but which considerations of justice or leniency required should be recognized by it.

In fact it can be conclusively assumed that there were but few other grants which could be presented to tribunals organized after 1860. The territory West of the Perdido had been occupied by the United States since 1803 (upon the taking effect of the treaty with France) and that East of the Perdido had been the property of the United States since a time not later than the transfer of possession July 21st, 1821. Beginning with the act of March 26th, 1804, (2 Stat. at L., 283,) Congress passed numerous acts for the purpose of enabling claimants of lands within the territory West of the Perdido to enforce such claims, and beginning with the act of May 8th, 1822, (3 St. at L., 709,) passed like acts for the benefit of claimants to those lands east of the Perdido. It may fairly be assumed that after the lapse of fifty years in the former class of cases and forty years in the latter class, nearly all the claimants to whom the tribunals created by Congress were open had tested their grants in those tribunals.

There was a large class of grants, however, to whom those tribunals were not open, that is to say, those grants made in the territory west of the Perdido, after the treaty of San Ildefonso, by which the territory was conveyed by Spain to France, but before the actual transfer of the possession of the territory by Spain to the United States (the successor in title to France) and those grants made by the

lawful authorities of the King of Spain within the territory east of the Perdido, after January 24th, 1818, but before the cession or transfer of possession actually took place. The United States steadily maintained that all grants made between the two extreme dates, in both classes of cases were void, and as steadily refused to recognize any right in the claimants or to extend any leniency to them.

As early as the act of March 26th, 1804, (2 Stat. at L., p. 283, Sec. 14,) Congress declared void all grants made after the treaty of San Ildefonso, and the prohibition against the grants made east of the Perdido annulled by the 8th Sec. of the treaty of Feb. 19, 1819, is emphasized by subsequent legislation, the 6th Sec. of the act of May 23rd, 1828, (4 Stat. at L.; p. 284,) explicity declaring that "nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by said treaty or the decree ratifying the same by the King of Spain," and the 4th Sec. of the act of May 26th, 1830, (4 Stat. at L., p. 405,) expressly limiting jurisdiction of the courts to determine titles otherwise than according to the restrictions and limitations prescribed in the Act of May 26th, 1824, (4 Stat. at L, p. 52,) *i. e.*, according to "the stipulations of any treaty." Section 2, Act May 26th, 1824.

United States vs. Repentigny, 5 Wall., 211, (18-683.)

It would be a useless parade of research and learning for us to follow the various acts of Congress relating to these two classes of land and to show the gradual development of the liberal policy of the government in the treatment of all claims not coming within these two classes and the rigid adherence to the exclusion of these classes. Suffice it to say that they were constantly excluded either by statutory negation of the powers of the Commissioners and Courts to take cognizauce of them, or by provisions that the decisions of all claims should be according to the terms of the treaties and of international law, etc. The terms of the two treaties were invariably held to exclude the grants made within the respective periods mentioned above.

Gradually, however, the liberality to other claimants began to reach this class. Apparently the act of June 17th, 1844. (5 Stat. at L., 676,) was designed to reach them, but this Court decided that complete grants were not embraced, and held that it must follow the political department,

which held that the lands West of the Perdido were granted by France to the U. S., by the treaty of 1803.

U. S. vs. D'Auterive, 10 How., 609;
U. S. vs. Phil. and N. O., 11 How., 609;
Montault vs. U. S., 12 How., 47;
U. S. vs. Castant, 12 How., 437;
2 Pet. 317; 12 Pet., 516;
9 How., 151; 11 Wall., 643.

The effort was continued, however, and the consummation of the endeavors of Mr. Benjamin and others was the act of 1860, under consideration. The progress of these endeavors is well set forth in U. S. vs. Lynde, 11 Wall., and need not be repeated

Its history and its purpose is written broadly on the face of the act and is accomplished in two ways; first, by the fixing of a new date, the date of the cession or of the actual transfer of possession, instead of the dates fixed; as to the territory West of the Perdido, by the date of the treaty of San Ildefonso, and, as to the territory East of the Perdido, in the 8th article of the treaty of Feb. 19, 1819, and, secondly, by studiously refraining from requiring these claims to be adjudicated according to the *principles established by the treaties*, as had been done in previous acts, and by substituting therefor the declaration that the adjudication shall be that these claims were "valid or invalid according to the principles of *this* act," those principles of untrammeled justice and equity being entirely different from the principles of the treaties and the former acts, they shutting out and this letting in grants made in the extended period prescribed by this act.

We submit that from the face of the act, its inclusions and exclusions, from the comparison of it with preceding acts, and from the circumstances just above considered, there can be no question that grants made in Florida after Jan. 24th, 1818, have been taken from under the bar of the treaty and subjected to the same investigation as those made before. As this Court says, "That is the unavoidable inference to be derived from its language and from the acts and course of decisions out of which it arose."

U. S. vs. Lynde, 11 Wall., 632.

We have gone over this recital and reasoning because of the charm of the subject and the importance of the case, but it is scarcely necessary to do so, because,

C. Decisions of this Court decide the *principle* absolutely, *i. e.*, that grants in the territory west of the Perdido and invalid because made after the treaty of San Ildefonso were validated by the Act of 1860 under consideration. The position of such grants differed, of course, in respect to their invalidity and the design of the act to validate them, in no wise from the grants to lands east of the Perdido. The former were invalid because of the fact that the United States refused to admit that Spain was at the time of the grant the owner of the territory in which the lands granted lay, while in the latter the invalidity arose out of the positive stipulation between Spain and the United States, that the United States would refuse to recognize them if made after Jan. 24, 1818. The reason for their invalidity was, therefore, different, but the fact of invalidity was the same, and the reason for the validation was the same, *i. e.*, the awakening of the United States to the consideration that the equities in favor of the recognition of such titles should overbear the legal objection to their enforceability.

If, however, the original bases of invalidity of the grants in the territories upon the east and west of Perdido were different, yet they soon became the same, for by the Act of March 26th, 1804, there came into existence a legislative declaration of the invalidity of the grants west of the Perdido; specifically declaring such grants "to be and to have been from the beginning null and void and of no effect in law or equity," while as to the land east of the Perdido, a like legislative declaration arose in the Act of May 8, 1822

The position, then, with respect to these two classes of grants, as to their annulment, was the same, and the language of the act of 1860, being equally applicable to both, a decision that one class was validated by the statute is equally a decision that the other class was likewise validated.

Such a decision, point blank, as to the lands West of the Perdido, is found in

U. S. vs. Lynde, 11 Wall., 632.

This case presents a view of the causes which led to the passage of the statute, and, after holding that if the statute

had not been passed the grant in controversy would have been invalid, says:

"The act authorizes the claimants to present their claim for confirmation, and although it does not, in so many words, say that grants made by foreign governments, while in the possession of the territory and claiming sovereignty over it, if complete, regular and fair, shall be sustained, yet that is the unavoidable inference to be derived from its language and from the events and course of decisions out of which it arose. And although it does not expressly repeal that part of the Act of March 26th, 1804, which declared void all grants of land within the ceded territories made after the date of the treaty of San Ildefonso, yet its provisions, to have any effect at all, must be regarded as irreconcilable with that clause of the Act of 1804, and, consequently, as repealing it by implication."

Not only is this the language of this Court, but its decision was that the grant which had been made after the treaty of San Ildefonso and by Congress declared null and void, from the beginning, was, by virtue of the Act of 1860, validated, and it was confirmed.

This decision has never been doubted, but the point decided in it, as above, has been uniformly recognized. Thus, while the Court refused in a later case to confirm a grant because no present title was granted, but the claim was merely an uncomplied-with permission to inhabit and cultivate, yet it reaffirmed the principles of the act as follows:

"The objection of want of title in the granting power was removed by the act as to all grants made by the government in possession which were otherwise sustainable on the principles of justice and equity."

McMicken vs. U. S., 97 U. S., 204.

And again in confirming a grant this Court said:

"Although made, according to the views of our Government, after the title of Spain had ceased to exist, yet it was made while that government had actual possession of the country and claimed sovereignty thereof, and, therefore, it is within the purview of the Act of 1860, (12 Stat. at L., p. 85,) and comes clearly within the case of U. S. vs. Lynde, (11 Wall., 632.")

U. S. vs. Watkins, 97 U. S., 219.

In subsequent cases, which it is unnecessary to quote from, the same principle has been announced and applied;

Scull vs. U. S., 98 U. S., p. 410;
U. S. vs. Clamorgan, 101 U. S., p. 822;
Dauteri ve vs. U. S., 101 U. S.. 700.

It will be noted that while none of these cases relate to land east of the Perdido, yet that they are not confined to the "disputed territory" lying between the Perdido and the Mississippi, but one of them was in the "neutral territory," (U. S. vs. Perot, 98 U. S., 428,) and another in Missouri, (U. S. vs. Clamorgan, 101 U. S.)

This act, thus, was applied to grants of land irrespective of the territory in which they lay.

The only suggestion, which has been made, by the attorneys for the United States, why these decisions should not apply to land east of the Perdido is that this Court has expressly declared that while "the act was intended to validate all grants which were made to *bona fide* grantees of lands in the disputed territory while the Government remained in possession of the territory and claimed sovereignty over it," yet that it has also declared that such validation was "subject, of course, to the express exceptions of the treaty of 1819 and the supplemental declaration of the King of Spain finally annexed thereto."

This reservation by this Court evidently referred to the grants to Punon Rostro, de Vargas and Alagon, which were the express exceptions in the 8th article of the treaty and supplemental declaration. The Court refers to the treaty and the supplemental declaration as jointly defining the exceptions, yet the only exception in the supplement are these three grants. They, though not mentioned in the Act of 1860, did not come within its beneficent provisions, for their invalidity did not arise because of the time when they were made, but from the specific exclusion of them. Of course, the general terms of the act could not be construed to apply to grants specifically named in the treaty as excluded from recognition.

If the language of this Court, just quoted, does, however, have the meaning attributed to it by the appellant, then it is sufficient to say that the Court, having in mind lands in the disputed territory, used without reflection this language with reference to lands outside of it. This is shown conclusively by

D. The decision of this Court, expressly that the act applied to lands east of the Perdido, granted after Jan. 24th, 1818.

U. S. vs Morant, 123 U. S., p. 335.

This case is directly in point, has never been questioned, and is conclusive of the right of petitioners to resort to this Court for a confirmation of this grant, and to have it confirmed even though made after January 24th, 1818.

In that case two grants were in question, both made before Jan. 24th, 1818, but the order of survey had not been actually executed anterior to that period. The Commissioners rejected them on the grounds that there had been no evidence of cultivation, and that a grant was not perfect until an order of survey had been executed, and that this had not taken place until after Jan. 24th, 1818.

Outside of the question of fact as to cultivation (which this Court found in favor of the claimants,) two questions of law were presented; First, whether the grant was made after the period fixed in the treaty, because the order of survey was executed after that period, and Second, whether, if so made after that period, it was, therefore invalid and unenforceable even after the passage of the act of 1860.

This Court could have decided the case by deciding that although the orders of survey were not executed until after Jan. 24th, 1818, yet the grants was made before, but it deliberately, and in terms put aside a discussion of this question and decided the other, saying,

"The Commissioners construed these provisions of the treaty as invalidating grants made prior to the date named, if the surveys were not completed until after that date. This construction was oppposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the Act of 1860, under which the present proceedings were instituted made the date of the cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. That act was passed for the relief of the parties who claimed lands in Florida, Louisiana, or Missouri, by virtue of grant, concession, or of survey, permission to settle or other written evidence of title emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said states were formed, or during the period when any

such government claimed sovereignty or had actual posession of the district or territory in which the lands so claimed were situated."

Thus, the adverse holding of the Commissioners directly on the point was disapproved, and the grant was confirmed. This is conclusive and there need be no further discussion of the objection.

The objection that the grant may not be confirmed under authority of the Act of 1860 is, therefore, directly met and conclusively overcome by the decision of this Court.

The right to have this grant confirmed is not barred by any rejection by any public officer, acting under authority of Congress, as fraudulent.

The argument of the United States *contra*, is based upon the reasoning that the eleventh section of the Act of 1860 prevented the court below from passing upon any claims coming within the purview of the third section of the act; that this third section prohibited the confirmation of claims which had been rejected by any public officer acting under authority of Congress; that Judge Brackenridge rejected this claim as fraudulent; that he was a public officer acting under authority of Congress, and, therefore, that the court below had no authorty to confirm this claim.

The answers to this are manifest:

1. That Judge Brackenridge was not such public officer as contemplated in the third section;

2, That he did not reject the claim as fraudulent; and,

3. That having found that the grant was made after January 24, 1818, he had no jurisdiction to decide that the claim was fraudulent.

(Only the proviso of the fourth paragraph of section three of the act of 1860, and not the whole section, is meant by the reference to the third section in the eleventh section.

United States vs. Scull, 98 U. S., 410;
United States vs. Morant, 123 U. S., 325.)

1. The public officers contemplated in this proviso were the registers and receivers, who by sundry acts of congress had been authorized to investigate these claims.

See Section 3 of the act of March 3, 1823, (3 Stat. at L.,

p. 757,) and Section 6 of the act of March 3, 1825, (4 Stat. at L., p. 126.)

Rejections by Boards of Commissioners had just been provided for, but to make the exclusion complete, it was necessary to include other officers to whom congress had from time to time given authority to investigate and confirm or reject.

Under the rule *ejusdem generis* the "other public officers" must be taken to be those of like kind with the Boards of Commissioners just named, (2 Lewis' Sutherland on Statutory Construction, Sec. 433; State vs. Ennis, 79 Mo. App., 12,) that is, functionaries created by acts of congress for special limited services; officers whose decisions would not ordinarily be final, but upon whose findings, based upon the ground mentioned in the proviso, the act of 1860, places the seal of finality. The decisions of the courts upon the contrary would in all cases be final. If a lower court should reject a claim upon the ground of fraud, that decision would be final unless appealed from, and if an appeal were taken, the decision of the appellate court would be final. There was, therefore, no necessity for including courts in the scope of this proviso. If it was so intended, it is inconceivable that congress should not have declared such intention specifically, instead of using words which were at the least inapt in conveying such meaning. The same result would arise from the application of the rule that general words following particular will not include things of a superior class, and the Court being of a class superior in its functions to the Boards of Commissioners, Courts would not be included in the "other officers." (2 Lewis' Sutherland on Statutory Construction, Sec. 435.)

2. Judge Brackenridge did not reject the claim as fraudulent. He expressly devoted himself to finding "whether this be a genuine grant within the time fixed by the treaty," because he says, "if it be not, it is useless to take into view the authority of the granting power *or the regularity* of the grant." (Transcript p. 76.)

The first inquiry as to whether it was a genuine grant, he solved readily, relying, outside of other considerations, upon the admission of the parties, saying, "I consider this as superceding all further inquiry. The official signatures are admitted to be genuine."

This having been decided, he set himself to finding whether the grant had been made before January 24, 1818, the limit provided in the treaty, or thereafter. The evidence presented by the petitioners purported to show that it was made before that date. The grant—registro—introduced by the United States showed that it had been made after, but that the dates had been altered for the purpose of making it appear to have been made before. Two questions then presented themselves. Did the exemplification presented by the petitioners, or the registro presented by the United States, control, and if the latter, did it show that the grant was made after January 24, 1818?

The Judge decided that the registro controlled, and that it showed the grant to have been made after January 24, 1818. In determining this he had also to determine whether the registro as altered, or as it was before alteration, controlled, and he decided that there being no *salvado* to the alterations, they were ineffective and that though the alterations, if given effect, would have shown the grant to have been made before January 24, 1818, yet, since they had no effect, the instrument must be taken to have been made at the date shown before alteration, that is, after Jan. 24, 1818. The result of all this was that he found the grant to have been made after the time recognized by the treaty, and hence not confirmable by him, the express authority under which he acted (Sec. 6, Act of May 23, 1828, 4 Stat. at L., p. 285,) forbidding him "to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain."

He does use language which seems to show that he thought the absence of the *salvado* fatal to the grant, but it cannot be conceived that he intended to make that a foundation for his decree, for the reason that such a holding would have been palpably wrong in the face of the Spanish Law and of the common law, (See page 81 and following of this brief) and that such a holding would have been unnecessary and *obiter*, for whether the grant was entirely void by reason of the alterations, without a *salvado*, or not, was immaterial, for even though genuine, if made after January 24, 1818, it was annulled by the treaty.

Besides this, the fact that he might have found the grant to be void by reason of the absence of the *salvado*, was not tantamount to a finding that it was void because fraudulent,

nor to rejection because fraudulent. We apprehend that under the view which he took, even alterations made innocently and properly at the time of the making of a grant, not saved by a *salvado*, would have the effect of avoiding the grant. If this be true, then of course a finding on the ground of voidness for this reason was not a finding that the grant was fraudulent.

It seems clear from the decision, that it was not rejected by him (that is, because,) fraudulent, but as (that is, because,) not made before January 24, 1818.

3. But even if Judge Brackenridge intended to decide that the grant was fraudulent, he was without jurisdiction to do so, because after he decided that it had been annulled by the eighth article of the treaty, and therefore was beyond his cognizance under the act investing him with jurisdiction, he had no right to inquire into the merits of the grant or into any objections to it.

For the sake of saving a repetition, we refer specially to our argument on this point on pages 73 to 75 of this brief, and particularly to the decision of this court there cited.

United States vs. Baca, 184 U. S., 63.

Respectfully submitted,

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FILE COPY.

Supreme Court of the United States

October Term, 1906

No. 69

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UNITED STATES, APPELLANT

vs.

THEODORE DALCOUR

et al., Heirs of John Forbes, et al., deceased, et. al.

Appeal from the District Court of the United States
for the Southern District of Florida

Brief of the Heirs of John Forbes, Appellees

Supreme Court of the United States

October Term, 1906

No. 69

UNITED STATES, APPELLANT, vs. THEODORE DALCOUR et al., Heirs of John Forbes, et al., deceased, et al. Appeal from the District Court of the United States for the Southern District of Florida. Brief of the Heirs of John Forbes, Appellees.

The Heirs of John Forbes, deceased, Appellees, respectfully submit their

Statement of the Case

This proceeding was begun March 3d, 1875, by the heirs of John Forbes on petition to the District Court of Florida at Tallahassee, under the provisions of the Acts of June 22d, 1860, and June 10th, 1872, for the recovery from the United States of land, script or warrant in lieu of a certain tract of land granted by authority of the King of Spain prior to the cession of the Floridas in payment of a debt due by the Spanish Government. On January 5th, 1818, John Forbes, by Royal License a Merchant at Pensacola, presented his petition to that government for the grant of the said certain tract of land in lieu of payment in cash of said debt, which was acknowledged by the Captain General of Cuba and the Floridas to amount to one hundred thousand dollars, and to have been incurred for

the fitting out of vessels commissioned by Spain, arms and stores, losses and indemnities during the period of disturbance that existed while the ownership of the territory was disputed by her enemies. Cienfuegos, the Captain General, reciting substantially the petition of John Forbes, in the grant declares "that the said sum can never amount to this sum in a very thinly settled province in which lands remain uncultivated for want of persons to attend to their culture, according to the information which has been taken, and particularly that of the Surveyor General of his Majesty, Don Vincent Sebastian Pintado," and "that Don Juan Forbes by taking possession of it will be able to benefit the province" "and let the commandant of the said place of Penzacola in virtue of this resolution put him in quiet and peaceable possession of the aforesaid land." This act and deed of the lawful authorities of Spain made and executed before the cession of the territory, and more than four years before the transfer of possession, had never been confirmed by the United States and was therefore an imperfect and inchoate title when the heirs of John Forbes, individually by their respective Christian names and surnames and by their respective residences designated, filed by their attorney in the District Court for the District of Florida their petition under the provisions of the said Acts of June 22d, 1860, and June 10th, 1872, on the third day of March, 1875. After a succession of misfortunes, including prolonged illnesses and deaths of parties and counsel and the total destruction by fire of the entire record of the case, the District Judge declared the grant valid.

From his decree the United States has taken the present appeal.

In order to emphasize the ruling facts in the case it is important to observe that at the time the United States acquired for a pittance possession of the valuable Floridas, there was a disposition on the part of our government to exact the strictest legal compliance with the terms of cession and thereby minimize the claims of grantees under the former sovereign; and it is equally important to note the liberality with which Congress subsequently removed legal obstacles to the confirmation of the very grants which the courts were previously obliged from want of jurisdiction to reject. From the time of General Jackson's military operations there has been a gradual tendency in Congress to ameliorate the difficulties attending the confirmation of Spanish land grants in the Southern States. The final recognition of them by the Act of June 22d, 1860, on the brink of civil war, is almost analogous to the long delayed recognition by the United States of the right to interest on Spanish indemnities some years before our late war with Spain.

The difference in feeling that existed between the Land Commissioners of 1825 and the Congress of 1860 is seen by comparing the narrow tone of the Commissioners' Report upon Large claims found in the American State Papers, Public Lands, Vol. 4, p. 155, with the liberal provisions of the Act of June 22d, 1860. In that report, acting under authority of Congress, they say: "As the United States have only stipulated to ratify all grants of a particular date made by his Catholic Majesty or his lawful authorities in the Floridas, Congress, it is conceived, can reject those which are not of that character, as would have been done no doubt by the government of Spain." This recommendation undoubtedly retarded but did not ultimately defeat the recognition of meritorious grants. Unques-

tionably the more enlightened policy adopted by act of Congress approved June 22d, 1860, was of slow growth, but the broad reasoning of the Justices of the Supreme Court of the United States in their application of the Act to particular cases is distinctly modern Americanism. Although this is the last cause that can possibly arise under that Act, the history of our relations with Spain, past and present, affords many examples to justify liberality rather than parsimony in dealing with a foreign power or those grantees claiming thereunder.

The Act of May 8th, 1822, provided for the appointment of three Commissioners "for the purpose of ascertaining the claims and titles to lands within the territory of Florida as required by the treaty of the twenty-second of February, one thousand eight hundred and nineteen" * * * "dated previous to the 24th of January, 1818." But provided, further, that said Commissioners "shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity or shall exceed 1,000 acres, but in all such cases shall report the testimony, with their opinions, to the Secretary of the Treasury, to be laid before Congress for their determination."

The Act of May 26th, 1824, enabled "claimants to lands within the limits of Missouri and Territory of Arkansas to institute proceedings" for the same purpose. The Act of May 23d, 1828, 4 Stat. L. 284, was "an Act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida" * * * "containing a greater quantity of land than the Commissioners were authorized to decide" and provided that such claims "shall be received and adjudicated by the Judge of the Superior Court of the district in which the land lies."

John Forbes died in 1823, and in 1825 the Board of Land Commissioners had reported this grant to Congress as quoted above; but on November 6th, 1830, the Judge of the District Court of Florida, in which the land lay, rejected the claim. The petitioners were two claimants to an interest in the tract, who added as plaintiff "the heirs of John Forbes." The latter left two daughters, one of whom married Dalcour and the other Depestre. Both daughters lived in Cuba, and there is no reason to believe that they either authorized or had knowledge of the proceeding. The answer of the United States set forth that the said grant was not made to the two first named petitioners, John and James Innerarity, "that they were not in the purchase or grant of the said land or otherwise partners of the said firm of John Forbes and Co. Said grant was not made to them nor have they any interest in the said grant of land and therefore they have no right of petitioning for the same." * * * "If he had any heirs and legal representatives, such heirs and representatives should have been parties petitioners to this claim and ought to have been named by their Christian and surnames and not merely by the designation and name of heirs of and legal representatives of John Forbes, deceased."

The petitioners relied on the usual Spanish evidence of title, namely an exemplification of the expediente or original entries which contained the petition of John Forbes and the grant. Petitioners' exemplification was dated January 10th, 1818. On the trial they subpœnaed General Call, who had been commissioned by President Jackson to procure evidence from the archives in Havana, and also to represent the government against the grant, to produce the original expediente. On inspection they were surprised to find that the date January 10th

had been substituted for the real date, February 20th, which had been erased. Unfortunately for petitioners, there was no *salvado* or explanatory note of any kind whatever, and Judge Brackenridge admitted the document in evidence and rejected the claim. He said "a mere alteration of the date, names or other substantial matter in the original minute or record by erasure or interlineation does not of itself vitiate the record. It is only when it is corruptly done, for it may have been done in order to conform to the truth." But he also said there was no evidence of its having been corruptly done.

No appeal was taken from this dismissal of that petition for confirmation or any action under the Acts of 1844 and 1858.

Those really entitled were compelled to wait until Congress passed the Act of June 22d, 1860.

Then the Civil War broke out.

The reconstruction period followed and Congress extended the time for confirmation by the Act of June 10th, 1872, until three years after the date of that Act.

On March 3d, 1875, the heirs of John Forbes, all of whom were named by their Christian names and their surnames and further identified by their respective residences, began the present proceedings under the provisions of the Act of June 22d, 1860.

Then another difficulty arose which threatened to divert to strangers the entire proceeds of the claim.

One McCabe, who figures in the record as counsel for L. Z. Innerarity, soon after this proceeding was begun, secured a judgment for two million dollars against the legal representatives of John Forbes, the original grantee. The present suit

was begun March 3d, 1875, less than four months before it would have been barred forever. On December 14th, 1878, it is alleged, a petition was sworn to by a lady, aged, infirm and long since deceased, whereby new parties were admitted to two-thirds interest of the entire claim, the United States objecting to their right to become parties as it had objected in 1830. The McCabe judgment for millions against the heirs of John Forbes also had to be set aside, and that was not accomplished until 1887, when the judgment was reversed in the Supreme Court of the State.

In 1891 a greater catastrophe happened, when on the 19th of May in that year the town of Jacksonville, to which place the cause had been removed, was destroyed by fire and the court house and every vestige of the record in the case burned.

The case had been continued during the pendency of the McCabe judgment, and was so reported on the docket of the Attorney General at Washington. Subsequently a petition was filed for the restoration of the record, and afterwards a bill of revivor was filed and McCabe produced a copy of the record containing the alleged amendment of December 14th, 1878, made by himself. The Court restored the record.

The United States on November 21st, 1902, filed a motion to strike from the files of the restored record the alleged amendment dated December 14th, 1878, which admitted new parties to two-thirds interest on the ground that "the same constitutes a new suit and was not instituted and filed within three years from the tenth day of June, 1872," as required by the Act of Congress of that date. The parties admitted by this amendment are the descendants of those referred to in the answer of the United States in the suit before Judge Brackenridge in 1830

as not entitled to be parties in proceedings to confirm this grant.

The testimony on behalf of the petitioner for the restoration of the record was to the effect (1) that a clerk of the court who had served in that capacity since 1872 searched and found no files of the case after the fire (*i. e.*, May 19th, 1891). (2) That another clerk who had been so employed from 1874 to 1894 knew there was a petition, a copy of the State Papers, some subpœnas and some commissions issued and one or more lists of land. (3) That it was twenty-five years previous, but he remembered that he made a copy of the petition and certified to it for service on the United States District Attorney. (4) That it was commenced while Judge Frazer was on the bench, and he left the bench in 1876. (5) Counsel whose name does not appear of record had filed the petition for amendment of December 14th, 1878, admitting as parties descendants of the two petitioners objected to as parties by the United States in 1830, to two-thirds of the entire claim. (6) That he is long since deceased, but became counsel after the filing of petition for amendment, which was after the death of counsel for the heirs of John Forbes, who had filed their petition on March 3d, 1875. Widow of said counsel, who caused the alleged petition for amendment to be filed, although he was not attorney of record, testified that she visited with her husband the house of the one who swore to the said petition for amendment. (7) That one of the witnesses (McCabe) went to Tallahassee, where the suit was pending, with powers of attorney to collect a debt against John Forbes' heirs and that he had a judgment for two millions against Forbes, which was set aside, and that then the present suit was pushed against the United States until the

fire in Jacksonville, in 1891. But fortunately he had a copy of the record, which he offered in evidence.

The Court restored the record.

On motion to strike a plea to a bill of revivor subsequently filed it appeared that the plea was not to the whole bill, but only to a part thereof, to wit: The amendment filed December 14th, 1878, admitting new parties to two-thirds interest in the land.

The District Judge struck the plea. The United States District Attorney then moved to strike the amendment from the files of the restored record because it was not filed within three years from June 10th, 1872, which was denied.

The Court allowed the real date of the original expediente, to wit, February 20th, 1818, to be substituted for January 10th, 1818.

A master was appointed to ascertain the facts outlined above. His report was confirmed. The Court decreed the land and rights of entry to trustees for the benefit of those entitled as parties in interest whoever they may be, to be determined in a subsequent decree.

ARGUMENT

I

The Assignments of Error

There is nothing in these, it is submitted, to warrant a reversal of the entire degree. They are discussed on pages 11 to 32 of this paper book.

II

The Transcript of Record

Certified records of courts with an abundance of other well-authenticated facts are to be found in the record and fully justify a judgment as prayed for in the petition of March 3d, 1875, without considering, it is submitted, certain parts of this record which are irrelevant. It is analyzed on pages 33 to 43 herein.

III

The Decree

This is clear as to the confirmation of the grant, but involved as to "persons interested." *Vide* pages 43 to 54, this brief.

I

The Assignments of Error

There is nothing in these, it is submitted, to warrant a reversal of the entire decree.

In reply to the several Assignments of Error it is submitted:

I. It was not error for the Judge of the District Court to decree that papers claimed to be copies of the original record be restored to the files, because

(a) The re-establishment of its own record of a case is a discretionary power inherent in every court of general jurisdiction.

This power has been exercised in England and in the United States in a long list of cases.

In Sanderson *vs.* Walker, 1 Mylne and Craig's Report, p. 359.

A petition presented at the Rolls was afterwards heard by the Lord Chancellor, who made an order upon it; but before the order was passed the original petition was lost. The Lord Chancellor allowed a copy of it, certified by the under secretary of the Rolls, to be a true copy, to be filed in pursuance of the 27th of the new orders of December, 1833, instead of the original petition.

In Florida it has been recognized in a number of cases, as, for example:

Keen *vs.* Jordan, 13 Florida, p. 327.

Which was a bill in equity praying that the record of a judgment at law and an execution thereon which had been destroyed by fire might be re-established or supplied. It was

there held on demurrer to the bill that the power to supply a new record when the original has been lost or destroyed pertains to the court in which the record was made and is an inherent power in courts of general jurisdiction, although this power does not extend over the lost or destroyed record of a court of law. The Court said: "The power of supplying a new record when the original has been lost or mislaid is one which pertains to courts of record of general jurisdiction independent of legislation. It is an inherent power in such courts and has been acted upon in this State in Rhodes *vs.* Mosely, 6 Fla. 12, and in Pearce *vs.* Thackeray, decided at January Term, 1870. In Douglass *vs.* Yallop, 2 Burrow 722, a new judgment roll for a judgment rendered thirty years previous to a motion to supply the loss was ordered to be made. In Jackson *vs.* Smith, 1 Caines 496, a new nisi prius record was allowed to be made upon motion and affidavit that the original had been lost or burnt after six years. In White *vs.* Lovejoy, 3 Johns a fi fa on which a levy had been made was burnt and the Court ordered a new fi fa to be substituted.

The power has been long and frequently exercised in Alabama.

McLenden *vs.* Jones, 8 Ala. 298; Doswell *vs.* Stewart, 11 Ala. 629; Dozier *vs.* Joyce, 8 Porter 303; Williams *vs.* Powell, 9 Porter 493; Wilkinson *vs.* Brandon, 5 Ala. 608; Lyon *vs.* Bolling, 14 Ala. 753; Bishop *vs.* Hampton, 19 Ala. 792; 3 Ph. on Ev. 1066. Upon the destruction of any part of a record or of the process pleadings or orders in a suit the loss may be supplied by *making up others in their stead,* provided the Court is reasonably satisfied that the proposed substitute is of the *same tenor.* Upon that the Court where the suit is must exercise its

own judgment. Harris et al. *vs.* McRae's Adm'r, 4 Iredell 81.

The Supreme Court of the United States has recognized the principle in

Cornell *vs.* Williams, 20 Wallace 226,

Decided in 1873, where the records of a court were all burnt during the Rebellion and a copy of a copy admitted. The Court says: The secondary proof of the judgment in favor of H. H. Williams against Samuel M. Williams was properly admitted. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. * * * "It was satisfactorily proven that thirty instead of sixty was correct, the latter being a mistake of the copyist. The principle established by this Court as to secondary evidence in cases like this is that it must be the best the party has in his power to produce."

(b) The Court has the power under the provisions of the Act of Congress, approved March 3d, 1871, 16 Stat. at Large 474, Ch. CXI, to allow proceedings to supply the record on application of the parties entitled merely and affidavit of the substance of the record, and that the destruction occurred through no fault of applicants, the McCabe alleged copy being therefore unnecessary.

II. The Court did not err in overruling the demurrer to the bill of revivor filed herein, because

The Court having ordered the further prosecution of the cause to be by the survivors of (August) Augustin Dalcour, Edmund Depestre and of the other parties to the petition filed March 3d, 1875, for the benefit of those lawfully claiming, decided the questions of law raised by the demurrer except as to the running of statute of limitations and laches and the amendment filed December 14th, 1878, admitting new parties after the expiration of the three years extended by the Act of June 10th, 1872. These were *reserved*, and are *possibly* referred to by the terms "other matters" in the Decree of April 8th, 1905.

In Johnson Adm'x *vs.* Diversey et al., 82 Ill. 446,

The facts were similar to the case at bar. In 1861 the administratrix, soon after the death of her husband, filed a bill for an account of partnership funds. Then the Civil War broke out, complainant moved to a State in rebellion against the government, and from 1862 to 1869 but little was done by either party towards securing a final trial. In the latter year the partner died, and in 1871 the record was destroyed in the Chicago fire. When it was found impossible to restore the records and files of the case with any degree of accuracy, the bill of revivor which had been filed was dismissed and a new bill filed. Held that there were no such laches shown on the part of the complainant as to deprive her of a standing in a court of equity, and that it was error to refuse to hear evidence on the merits of the case and to dismiss the new bill.

III. The Court did not err in granting the motion of claimants to strike from the files the plea of defendants to the bill of revivor, because

(a) It was not a plea to the whole of the so-called bill of revivor, but only to the alleged amendment of the bill filed December 14th, 1878, admitting claimants after they were barred by the Act of June 10th, 1872.

(b) The Judge of the District Court in his final decree confirming the grant reserves to the Court such further direction as to the respective undivided interests of the "original petitioners" and the heirs and legal representatives of such of the original petitioners as have died or may die before the termination of the suit "and of all *persons claiming* any rights to said land or said rights of entry *under them* or any of them" as may be necessary and as may be equitable and just. *Vide* Record, pp. 132, 133.

(c) A final order having been made in the original bill, there was no further action to be taken in the bill of revivor.

IV. The Court did not err in denying defendants' motion to strike the amended petition from the files, because

(a) The amendment of December 14th, 1878, in the restored record will have its proper weight in view of the Act of June 10th, 1872, so far as the two-thirds interest in the tract is concerned as claimed by the new parties named in the said amendment when the decree is carried into effect, the final decree of the Judge of the District Court recognizing the duty of complying with the principles of the Act of June 22d, 1860, and as may be equitable and just.

(b) In effect the decree awards the land and script to trustees for the use and benefit of such rightful parties as the Supreme Court shall recognize.

(c) If, according to the principles of the Act of June 22d, 1860, and by virtue of the Act of June 10th, 1872, the patents

and the rights are issued to the parties entitled under those acts, it is immaterial that the amended petition was not stricken from the files of the restored record. The amendment of December 14th, 1878, is founded on inadmissible evidence and therefore irrelevant.

(d) In view of the entire record having been accidentally destroyed by fire and restored by order of the Court anything alleged to be part thereof should be allowed to appear, in the absence of a jury, for what it is worth.

V. The Court did not err in granting claimants' motion to correct the date given in their petition as the date of the Captain General's deed to John Forbes, because

(a) Although impossible to have exercised this power at the trial in the suit dismissed in 1830 under the provisions of the Act of May 23d, 1828, yet this power to correct a date or mistake is necessarily implied, not only by the rules of equity, but also by the Act of June 22d, 1860, in order to decide upon the validity of the claim according to the principles of equity and justice.

In U. S. *vs.* Lynde, 11 Wallace 632,

The Court says: "If it should appear that a claim was honest and meritorious but defective in form or completeness, it might be the duty of the tribunals to sustain it as an equitable if not a strictly legal title."

(b) The policy of Congress respecting this grant is opposed to the policy of the general rule respecting deeds laid down in Pigott's case, 11 Co. 27, namely, that a material alteration by a stranger or an immaterial one by an obligee avoids the deed. Therefore that rule of law does not apply to the case at bar. Deeds containing erasures were held void because

they appeared on the face of them to be suspicious. The *reductio ad absurdum* is in Moore, 35 pl. 116, where a deed which had been rased was held void, although the party himself who made it had also made the erasure; which was permitting a party to avail himself of his own fraud.

(c) If the Spanish official who copied the grant made the erasure, his act permitted his government or its grantee, John Forbes, to avail themselves of their own fraud if the principle laid down in Moore, 35 pl. 116, be applied to the present case. Or if an agent of the United States, from motives best known to himself, was responsible for the alteration, it likewise operated to defeat claimants' right in the suit rejected by the Judge of the District Court in 1830.

(d) "The Act of June 22d, 1860, was intended to modify the harshness of previous acts and decisions." As early as 1828 the injustice wrought by the Statutes, 13th Eliz., Chap. 5th, and 27th Eliz., Chap. 4th, was recognized in Pennsylvania in the Common Pleas of Philadelphia County in the matter of Bradway's Est., 1 Ashmead 212, in which King, P. J., says: "The position is founded on the maxim that a deed made void in part by a statute is wholly bad, although at common law an instrument may be partially void and good for the residue. (13 Vener. Abr. 571, Bac. Abr. 541, 549, 10 Rep. 100.)" * * * "The settled construction, however, is that this rule is not applicable to fraud by construction of law, but only to such as are tainted by actual fraud."

(e) According to the old decisions where a mere mistake was corrected in a deed and not known by whom, it was held to avoid it, 2 Rol. Abr. 29 pl. D; but the whole tenor of the Act of June 22d, 1860, was for the purpose of giving relief

from the application of former acts and decisions.

In U. S. *vs.* Morant, 123 U. S. 335, the Court (in 1887) says the Act "was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different Boards of Commissioners and by the courts under the strict construction of the treaties which prior laws had required." And in discussing what range of discretion was intended says: "The probable meaning is, that these principles (*i. e.*, equity and justice) are to be applied to each particular case."

(f) It is held in the following cases that an amendment which changes a date does not change the cause of action. Wilsen *vs.* Phillips, 8 Kansas 211, Bussey *vs.* Rothschild, 27 La. 316, Bailey *vs.* Musgrove, 2 Sergeant & Rawle 219, which apply to the date of a promissory note, and Warren *vs.* Ocean Ins. Co., 16 Me. 439, to a policy of insurance, and Marshall First Nat. Bk. *vs.* Hosmer, 48 Mich. 200, where a judgment was corrected in Niemarck Schwartz, 51 Mich. 467, and Stevenson *vs.* Mudgett, 10 N. H. 338.

In a foreclosure suit plaintiff was permitted to amend by changing the alleged date of the maturity of the note. Jones *vs.* Henderson, 49 Ga. 170. In Reed *vs.* Scott, 30 Ala. 460, and in Moore *vs.* Christian, 31 S. Car. 337, an amendment was allowed changing the instrument sued on as a promissory note to a bond under seal.

In Fields *vs.* Ft. Worth & D. C. Ry. Co., 30 Southwestern Reporter, p. 255, "In an action against a railroad company for unjust discrimination in freight charges one of the facts complained of in the second amended petition (filed October 5th, 1891), was alleged to have occurred March 9th, 1889, but in

a third amendment (filed May 3d, 1892), plaintiff averred that the true date of such discrimination was April 20th, 1890. Held, that the cause of action was not barred by the two years of limitations."

VI. The Court did not err in decreeing that the grant made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, was a valid title against the United States, because

(a) It does not appear that the alteration was made by the claimants. Changes, however material, made in a document by a stranger to it are, in legal contemplation, wholy immaterial and ineffective to give to it any other or different meaning or operation than that which attached to it before such change.

(b) Viewed as a mutilation, it enabled the United States, the defendant in possession of the document, to win the suit; but no suspicion of wrongdoing was attached to either party to the suit.

(c) Inspection of the grant discloses the important fact that no attempt was made to commit a forgery. It was a self-evident erasure and substitution, but unfortunately without the sanction of a "salvado," or explanatory note.

(d) The fact that the document in the possession of the claimants at the trial under the provisions of the Act of 1828 was dated January 10th, 1818, and that the alteration in the document brought by the United States from the archives at Havana by Mr. Call was made to correspond therewith and made by one whose reasons for so doing and whose identity are unknown to the parties to the suit does not destroy the evidence contained in the document that the grant was made on

February 20th, 1818, which was before the cession of the Floridas to the United States, and therefore by virtue of the interpretation of the meaning of the Act of Congress approved June 22d, 1860, valid.

(e) The alteration of a deed of conveyance, though it may deprive the covenantee of all right to sell upon the covenants therein contained, does not affect the ownership of the property conveyed, and the deed may, it seems, still be adduced in evidence to show what was originally conveyed thereby, West *vs.* Steward, 14 M. & W. 47. In such cases, to use the words of Lord Abinger in delivering the judgment of the Court in Davison *vs.* Cooper, 11 M. & W. 800: The deed is produced merely as a proof of some right or title created by or resulting from *its having been executed.* (See Green *vs.* Attenborburough, Cam. Scac. 3 H. & C. 468, where this distinction was adopted, and also per Lord Esher, M. R., in Suffell *vs.* Bank of England, 92 B. D. 568. Also in the Earl of Falmouth *vs.* Roberts the rule as to the destructive effect of altering a written instrument was stated by Parke, B., to apply where the obligation sought to be enforced is *by reason of the instrument.*

(f) Such was the carelessness of the clerks in the government offices at Havana that in the case of Colin Mitchell the translator says: "These Spanish documents are most wretchedly copied, so much so at many times as to render them perfectly unintelligible and many other times, which is still worse, to make the sense entirely different from the one intended."

(g) The identity of the person who caused the original to correspond with the copy or his reasons for so doing are unknown. *Non constat,* that it was not a careless clerk's attempt to cover up his mistake or an overzealous United States em-

ployé's mistaken idea of loyalty to defeat an unpopular claim against his government.

VII. The Court did not err in decreeing petitioners entitled to a patent for lands of the tract not sold or otherwise disposed of and to private entry of public lands at one dollar and a quarter per acre for the area sold because the question of present owners is reserved for "further direction."

VIII. The Court did not err in deciding that a claim for lands in East Florida by virtue of a grant made by the Captain General of Cuba on the 20th day of February, 1818, could be confirmed under the provisions of the Act of Congress approved June 22, 1860, because

(a) This act makes the date of the transfer of possession to the United States, viz., July, 1822, the point from which to test the validity of the grant.

In U. S. *vs.* Morant, 123 U. S. 335,

Mr. Justice Bradley, in delivering the opinion of the Court says: The Act of June 22d, 1860, was intended to give relief to a large class of grantees of former governments whose claims had been rejected by the different Boards of Commissioners and by the Courts under the strict constructions of the treaties which prior laws had required. * * * The treaty by which the Floridas were ceded to the United States was not concluded and signed until the 22d day of February, 1819, and the ratifications were not exchanged until two years afterwards. The cession certainly did not take place, therefore, before the date named, and possession of the territory was not taken until July, 1822, whilst all the acts constituting the titles in question were passed prior to May, 1818. We cannot hesitate to conclude, therefore, that these

titles were completed within the time required by the Acts of 1860. The old cases have no application. Prior statutes inconsistent with the provisions of the Act of 1860 no longer control our decision.

In McMicken *vs.* U. S., 97 U. S. p. 204,

The Court says: "In 1846 McMicken instituted suit in the United States District Court of Louisiana against the United States under the provisions of the Act of June 17th, 1844, for the confirmation of the grant, but the suit was not prosecuted when called up for trial and was dismissed and judgment entered for the United States. In March, 1873, the present suit was brought under the Act of June 22d, 1860, entitled An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri and for other purposes. The government does not stand upon formal conditions. The Act of 1860 expressly gives relief not only in cases of 'orders of survey duly executed, but when there has been any other mode of investure of title by separation of the land from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances by the competent authority prior to the cession of the United States.

In D'Auterive *vs.* U. S., 101 U. S. 700,

Which had been presented to the District Court and appealed to the Supreme Court and rejected in 1859, Mr. Justice Clifford, in delivering the opinion of the Court (1879), says: "We adopt the construction given the last reported case upon the subject as follows: 1. That the claimant or those under whom he holds must have been out of possession for twenty years or more. 2. That the land must be claimed by a com-

plete grant or concession or order of survey or other mode of investiture in the original claimant by separation of the tract from the mass of the public domain, either by actual survey or defined, fixed natural boundaries or initial points and courses and distances, by competent authority prior to the treaty of cession. 3. That those conditions do not apply when the title was created and perfected during the period of the actual possession of him under whom the claim is asserted. Titles in fee simple which were complete when the jurisdiction of the province was transferred to the United States needed no confirmation, as they are fully protected by the treaty of cession. U. S. *vs.* Percheman, 7 Pet. 51, 88, U. S. *vs.* Wiggins, 14 id. 334, 349. 4. That the title must be complete under the former sovereign—that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise, that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*, or, in other words, the separation of the tract from the public domain must not be mere conjectural separation, but complete without any element of discretion or uncertainty. Scull *vs.* U. S., 98 U. S. 410, 418; Smith *vs.* U. S., 10 Pet. 326."

(b) The cases decided in 1852 do not govern the present suit, and the claims founded on the three grants in favor of Alagon, Punon Rostro and Vargas are within the purview of the proviso of the third section of the Act of 1860 and therefore null the Act of June 22d, 1860.

Moreover the history of the negotiations shows that no title founded on those grants could ever be declared valid, on one ground alone, namely, "the conditions of the said grants not having been performed," the principal condition being residence.

The history of this claim and the terms of the present grant answer this objection. John Forbes was a bona fide settler braving the dangers and vicissitudes of a loyal subject among the King's enemies, in peaceful pursuits, and there was a moral obligation on the part of Spain that passed to an equitable right long before the first proposals of cession, which the honor and dignity of the sovereignty of his Catholic Majesty put its stamp upon. The Captain-General made the grant an equitable one by his decree of January 5th and a complete one by affixing his signature February 20th.

The fixing of the date, January 24th, 1818, was merely a way of coming to terms. The distinguished negotiators, Mr. Adams and the Chevalier Onis, with the assistance of Mon. Hyde de Neuville, the French Minister, after projet and counter-projet, did finally agree upon it, but the reason for it was not only to exclude claims "qui no tienen merito," but were so extensive in area as to amount to a genuine spoliation.

The negotiators knew that the conditions of the grants had not been fulfilled by the King's favorites who remained in Spain, and on that ground alone an arbitrary date was fixed to avoid the examination of each claim.

Surely the United States will not avail itself of this technicality to aid Spain in repudiating any claim which is founded on such good consideration as appears in the history of this cause.

The Act of June 22d, 1860, Vol. 12, p. 85, provides in Section 1,

That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana or Missouri, by virtue of grant, concession, order of survey, permission to settle or other written evidence of title emanating from any foreign government bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory in which the lands so claimed are situated, shall be, and they are hereby, authorized to make application for the confirmation of their title to the lands so claimed in the manner following, to wit, etc.:

Section 11. And be it further enacted that in 'any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, where the lands claimed have not been in possession of and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant or concession, or order of survey duly executed, or by any other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses and distances, by the competent authority, prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign

governments from which it emanated claimed sovereignty over, or had the actual possession of such territory, the person or persons, his, her, or their heirs, devisees, legal representatives or grantees, so claiming such lands, may, at their option, instead of submitting their claim to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands or any part of the lands claimed may lie, unless such claim comes within the purview of the third section of this act, to which section the United States shall be made defendant, and it shall be verified by the oath of the party or parties, and conform to the provisions of Section 1 of this act, and to the practice of such court in chancery, and the attorney of the United States for such district shall defend against the same for the United States; and the court shall decide the claim valid or invalid according to the principles established in this act and decree accordingly. If the decree be against the United States an appeal shall be entered to the Supreme Court of the United States; and if it be against the claimant or claimants, he or they may take an appeal directly to that Court, as of right and course, without affidavit or security other than for costs; and the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals in chancery, and as equity and justice and the principles aforesaid may require; which decision shall be final, and patent shall thereupon issue, if the claim be adjudged valid, for so much of the lands claimed as remain unsold; and for so much as may have been sold, the provisions of Section 6 of this act shall apply and be in force.

Section 3 empowers the commissioners to reject "for any cause sufficient in their opinion to justify such rejection," and

the *proviso* directs them to omit any claim theretofore rejected as fraudulent or twice rejected on the merits in their report of claims to the Commissioner of the General Land Office. The only rejection of any kind affecting this grant was that of the petition of James and John Innerarity on November 6th, 1830, in these words: "Being fully satisfied that *the claimants* have no *legal* grant prior to the 24th of January, 1818, I feel myself bound to reject *their petition*." Record, p. 80. He also says: "It is noted by the Commissioners before whom the testimony was taken that it was admitted 'by both parties that the official signatures to the document marked (A) under which the petitioners' claim are genuine.' I consider this admission as superseding all further inquiry," pp. 78, 79. Notwithstanding his able discussion of equitable grounds for affirmance he feels himself bound for the above reasons to reject their petition. It can hardly be said in this Court after such an expression from such a source that the grant to John Forbes comes within the purview of the third section of the act under which they claim.

It is submitted that a grant made before the cession, based on a previous equity, genuine as to signatures and description, ought not to be rejected because a date occurring during the preparation of the expediente was subsequently adopted by the terms of the treaty as a test of authenticity applying to all grants without affirmative proof of knowledge of such future test in the grantee and improper motives.

While the date applies to the enormous grants to the Duke of Alagon, Count Punon Rostro and Don Valgas and bring them within the purview of the third section of the Act of June 22d, 1860, the evidence before the court is totally different in the present case.

On January 5th, 1818, the Spanish government committed itself to the grant in the following decree:

HABANA, *y enero 5 de 1818.*

Para proveer lo que corresponda llevase al asesor gener[l].

CIENFUEGO. MIGL. MENDEZ.

En la Hab[a] en dicho dia la dice saber a D[n] Juan Forbes.

CIENFUEGO. MENDEZ.

Transcript of Record, p. 136.

I have carefully translated the above, and it undoubtedly means the Captain General's approval and direction to his Assessor General to advise correspondingly with the petition of John Forbes. Everything in the expediente after that is merely ministerial. The title passed January 5th, 1818.

IX. The Court did not err in deciding that the grant was not null and void by virtue of the 8th article of the treaty of the 22d of February, 1819, because

(a) Since the act of June 22d, 1860, the Court has recognized that Congress has prescribed a policy which waives the rights asserted by the Board of Land Commissioners in 1825 as to the date of the grant and by the Court under the strict construction of the treaties which prior laws had required.

In U. S. *vs.* Morant, 123 U. S. 335.

Already cited, this principle is expressly laid down. The Court says: "The old cases have no application. Prior statutes inconsistent with the provisions of the Act of 1860 no longer control our decision."

In McMicken *vs.* U. S., 97 U. S. 204, it appeared that suit had been instituted in 1846 under the provisions of the Act of June, 1844, and judgment entered for the United States. Notwithstanding this judgment the Court said: "In March, 1873,

the present suit was brought under the act of June 22d, 1860, entitled, 'An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri, and for other purposes.' The Government does not stand upon formal conditions. The Act of 1860 expressly gives relief, etc."

In U. S. *vs.* Morant, 123 U. S. 335.

Which was begun like the case at bar, by petition filed under the 11th section of the Act of 1860, the Court says: "Whatever may be the proper construction of the 8th article, the Act of June 22d, 1860, 12 Stat., 85, makes the date of the transfer of possession to the United States, viz., July, 1822, the point from which to test the validity of the grants."

And further says: "This view of the subject (i. e., the duty of sustaining an equitable if not strictly legal title) relieves us from the ungracious task of construing treaties and reviewing the conduct and policy of the Government. Congress, by the Act of 1860, has declared its own policy, and left us simply the office of judicially carrying out its enactments in individual cases as they come before us. Congress has laid down the general rule by placing the grants in question on a platform of equality with grants made by our own Government, and has left to the tribunals the duty of examining the merits of particular applications."

(b) Article 8 of the Treaty of February 22d, 1819, was inserted to prevent a spoliation of nearly the whole territory by three Spanish noblemen residing abroad. This is narrated by Chief Justice Taney in Doe *vs.* Braden, 16 Howard, 654.

(c) The petition of John Forbes was based on the evidence pointed out by the land commissioners of 1824. An equitable right had accrued. Why the conveyance was not made by the

Indians, long before the proposals of cession, the commissioners say they do not understand. Am. State Papers Public Lands, Vol. iv. p. 172.

(d) Even before the Act of June 22d, 1860, there were equitable grounds for confirming the grant to the heirs of John Forbes. But the two daughters of the grantee, Señoras Dalcour and Depestre, lived abroad and probably were unacquainted with their rights. The petitioners of 1828, James and John Innerarity, were not entitled to sue for the confirmation, and, moreover, all Spanish grants were unpopular because every act of King Fernando VII. was viewed with suspicion on account of the Camarilla of Courtiers, who influenced him.

Although the declaration in the last clause of the eighth article of the Treaty of February 22d, 1819, is as sweeping as the objectionable grants to the Spanish Grandees, it is contended that it was not the intention of Mr. John Quincy Adams, the distinguished American Secretary of State, or of the Chevalier de Onis, the Spanish Minister who conducted the negotiations, to deprive a single bona fide grantee, whether by equitable or legal title, of the enjoyment of the same rights he would have enjoyed under the former sovereign. Their difficulty was to avoid fathering those illegitimate offspring of the King's bounty without disregarding obligations which the Spanish monarch considered more binding perhaps than legal ones. That the United States has no such consilerations of honor and dignity has long been, unfortunately, the mistaken feeling of the Spanish people.

Mr. Adams expressly declares in his counter-projet, No. 8, the reason for the insertion of so harsh a rule as a *date* in the distinction between good and bad titles. In that counter-projet he submits the following:

"All grants of land made by or in the name of his Catholic Majesty in the aforesaid territories after the 24th of January, 1818, shall be null, *the conditions of the said grants not having been performed by the grantees.*"

This language must have applied to the three foreign noblemen living abroad excepted at the ratification on October 24th, 1820, and not to John Forbes, whose grant was unconditional and who had settled long before on the land granted. 3 Foreign Relations, 619 et seq.

The purpose of a clause so contrary to the ordinary conception of right and justice ought to be known and the article interpreted accordingly.

Nothing can be gathered from the negotiations except what is even more favorable to the view. The efforts of the Southern members of Congress, however, aided by the conservatives from the North, finally resulted in the Act of June 22d, 1860, which extended the right of confirmation without reference to any date whatever "prior to the cession." This Act was for the benefit of a limited number of cases that had not been decided in 1852, among those that form the argument in the present cause of the District Attorney in the Court below, but which have no application because Congress passed the act for the very purpose of permitting the Courts to ignore such a shiftless method of ascertaining the rights of grantees under the former sovereign.

That such was the intention of Congress is evident from the omission in this act of any reference whatever to "January 24th, 1818," which was carefully inserted in all the preceding acts. But the act goes further than that. It enables the Court to remedy mistakes, either of law or of fact, wherever they

may occur by providing that upon appeal the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeal thereto *in chancery*, and as equity and justice and the principles thereto may require. But aside from the *exact* date of the grant there is sufficient evidence before the Court to stand the test of validity required by this Court, namely, that it was made before the date of cession of the territory to the United States, or the time of transferring possession, the point from which to test the validity of grants, as clearly laid down in United States *vs.* De Morant, 123 U. S. 335.

X. The Court did not err in overruling the exception to the report of the Master that there had been 1,190,495.45/100 acres of land within the boundaries of the grant as described in the petition herein disposed of by the United States, because:

(a) The question of the extent of the land within the boundaries of the grant was a question of fact properly submitted to the Master, whose finding upon the testimony must be held in the absence of contradiction, as correct.

(b) The testimony shows that the description in the grant was such that the judgment was rendered with precision. D'Auterive *vs.* United States, 101 U. S., 700, Scull vs. 98 U. S., 410, 418; Smith *vs.* U. S., 10 Pet., 326.

(c) The petition filed by Theodore Dalcour et al., the heirs of John Forbes, on the 3d day of March, A.D. 1875, described with exactness the said tract of land as in the grant specified, its townships and ranges, and annexed a map giving the exact location of each as they are known on the United States Surveys. This it is submitted being a complete compliance with the requirements of the Act of June 22d, 1860, as interpreted by the next above cited cases.

II

The Record

Certified records of courts with an abundance of other well-authenticated facts are to be found in the record and fully justify a judgment as prayed for in the petition of March 3d, 1875, without considering, it is submitted, certain parts of this record which are irrelevant.

Analysis of the record restored by the Court reveals the following pertinent facts:

First, that the grant was made by Cienfuegos, Captain-General of the Floridas, to Don Juan Forbes, vide record, pp. 134, 136, the last line and supra, pp. 157, 159, Idem, pp. 9, 15.

Second, that the legal title is valid by the laws of Spain, and is admitted to have been in Don Forbes alone, pp. 10, 74, 127.

Third, that numerous amendments and the copy of the petition of intervention (Record p. 19), contained in the Record are irrelevant, vide record, amendments, pp. 2, 5, 15, 17, 18, Amendment to Amendment, p. 21; Amendment marked "Exhibit D," testimony of William McCabe, pp. 40, 48, 14th paragraph; p. 52, 4th paragraph, "Exhibit E"; p. 53, paragraph B, "Exhibit F"; p. 56, paragraph 10; order page 62, line 2; p. 63, paragraph 2; p. 65, paragraph 2. Motion of the United States District Attorney to strike Amendment to Bill, p. 66, pp. 106, 107.

The most important of these is the reason for the Fourth Assignment of Error, p. 132.

Fourth, that since June 14th, 1900, when resident counsel notified the District Attorney at Jacksonville that he had on

that day presented to the Court a petition (not in the transcript of record) by and on behalf of nameless "persons interested" (Record, p. 1), numerous amendments to the record have been allowed or suggested by the Court below, which ought not to embarrass the question of the validity of the grant.

Fifth, that the purpose of these amendments was to introduce the so-called "persons interested" as "parties complainants" in the Court below, in express violation of the terms of the Act of June 10th, 1872; one of them, the United States says, was not in the record before the fire (Record, p. 48, paragraph 14th). The copy of that alleged amendment is dated December 14th, 1878.

Sixth, that the effect of that amendment alone (Record, p. 52, paragraph 4), is to divert two-thirds of the proceeds of the entire claim from the rightful parties to said persons alleged to be interested.

Seventh, that the real purpose of the suit appears in the original petition of March 3d, 1875, (Record, p. 14), to wit: That "they (the heirs of Forbes) have a judgment against the United States, as follows: First, for the land described in the grant to John Forbes," and not as stated in the above-mentioned notice to the United States to "John Forbes *and Company*" (Record, p. 1.)

Eighth, that the addition of the words "and company" throughout the record on all copies or any part thereof is unwarranted and misleading.

Ninth, the proceedings to restore the record have brought out facts which require the modification of the decree.

On page 37 in the testimony of William McCabe, managing director of the North American Life Insurance Company,

of Toronto, Canada, on an issue before the court whether or not there was case pending and whether the papers had been destroyed, the witness stated that in the year 1875 he was travelling in Europe with letters to "leading gentlemen in London."

From that source he obtained a so-called bond executed by John Forbes for sixty-two thousand dollars ($62,000), admitting the receipt of that sum as representative of the firm, in which Forbes' co-partners were William Panton, John Leslie and a brother, Thomas Forbes. That on this bond or receipt he subsequently obtained as counsel of record in a Florida court, a judgment in favor of the firm of Panton, Leslie & Co. for a sum "in the neighborhood of two million dollars ($2,000,000)," after having failed in his attempt to enforce payment of the bond by intervention in the present suit.

On page 19 there appears a copy of a petition of intervention presented February 11, 1876, in the names of Santiago Innerarity and the other named heirs of James Innerarity, and John Innerarity. This petition avers inter alia:

"That the legal title by the laws of Spain was in John Forbes alone, but he was equitably and morally bound to share this land with John and James Innerarity according to their interest in the partnership of John Forbes & Co. That John Forbes owned two-thirds of the capital of the partnership and John and James Innerarity owned each one-sixth, or one-third for the two."

They show that their right is equitable, but they are assured that the heirs of John Forbes, whenever it is possible, will make their equitable title fully legal.

They ask to be permitted to intervene, and that their equit-

able right be acknowledged by the Court as heirs of John Innerarity and James Innerarity, leaving a settlement of their rights among themselves to be made by themselves.

They ask that a judgment be rendered in favor of complainants for the whole amount which they claim, merely recognizing the right of intervenors for an account for one-third from them "and endorsed [Copy] Supplementary petition in re Forbes Heirs vs. U. S. Presented Feb. 11, 1876. Denied."

On page 30, before Judge Locke, in the same issue, Mrs. Edward Janin testified as follows: "I think Mr. McCabe had a great deal to do with that case. I know Mr. Janin said after he took this large case for Forbes he found there was a judgment against his people for a great deal of money. And he said he would never have undertaken this case had he known it was handicapped; it would cost him too much time from this business, and he would have to reverse the judgment before he could go on with the original case. I remember his saying to Des Chapelles and Innerarity when they would write to him to go on with the case, he said he could not do any more work on the case until he got that judgment out of the way.

Q. Did you know Madame Eugenie Olivie?

A. Yes; I went to her house in the country with my husband to discuss the case with her. She took us up to New Iberia, where she had a plantation. I think she was the granddaughter of John Forbes, and she was an old lady and walked with a crutch.

Q. Do you know whether or not the suit was brought by him (Mr. Janin)?

A. Yes.

Q. Do you know whether his name appeared as attorney in any of the papers?

A. Yes.

Q. Was his name signed to the petition in the case?

A. Yes.

Q. Are you sure about that?

A. Yes.

On page 15 is a copy made by McCabe, according to his testimony before Judge Locke on page 41, endorsed amendment to petition, file mark December 14, 1878 (*Note.*—This is the date of the transfer of the suit on motion from Tallahassee to Jacksonville), signed P. Walter, clerk, which petition is signed L. D. Olivier, Eug. B. Olivier, the contents thereof being sworn to by Theresa Dalcour, wife of Eugene B. Olivier. The averments are inter alia as follows: (1) "That it was by mistake and error that the grant of land first set up and described in the original petition was described and stated to be a grant to John Forbes, and they now aver that said grant was made to John Forbes and Company, a commercial partnership existing at the time of said grant. (2) That at the date of said grant, said partnership was composed of John Forbes, who was the principal partner of James Innerarity and John Innerarity. (3) That in the absence of any knowledge on their part and of any evidence to the contrary, the petitioners aver and admit that the interests of each of said three parties in said grant was one undivided third."

This was evidently the object of Mrs. Janin's visit to Madame Olivier's plantation at New Iberia in 1878, but the copy was made by Mr. McCabe. The latter testified on page 44 as follows:

Q. Whom do you represent?

A. I did not prepare myself to answer that question, and

at my time of life my memory is not retentive; I could not give you the names with accuracy.

Q. Could you give the names of some you represent?

A. Mr. L. N. Innerarity, of Baltimore.

And on page 46, Q. Were you instrumental in bringing about these proceedings to re-establish these records?

A. Personally I was not; I was approached on the subject by the other side—by the petitioner.

Q. Did you preserve these records with a view of restoring these proceedings?

A. No, sir; quite accidentally. They were taken in the first instance for the reasons already given. That must be entirely clear to you and must be to the Court. The records show for themselves; it is not a concocted case in any way.

It is here submitted that the testimony of Mr. McCabe and Mrs. Janin, both now deceased, may be included without affecting the validity of the grant.

The answer was filed within sixty days, to wit, April 12th. On April 15, Record page 49, Demurrer, inter alia, "Matters of law to be argued." (3) "That by statute any party or person interested in the destroyed records is privileged to make application for the restoration."

On page 50. "On motion of plaintiffs' solicitor the case was transferred from Tallahassee to Jacksonville and suit continued until next term. It is averred inter alia "(3) Said petitioners further set forth with *unnecessary particularity the facts* connected with the *making* and confirming *of said grant* by the lawful authorities."

On page 56 "(10) That thereafter said cause was by order made therein transferred into the Eastern Division of

said District Court on, to wit, the 14th day of December, A. D. 1878. Said petitioners *obtained an order* therein giving them leave and by authority of such leave of court filed therein their amended petition, alleging that said grant of land was made to John Forbes and Company; that *by mistake* the original petition averred that the grant was made to John Forbes; that John Innerarity and James Innerarity were partners of John Forbes and grantees with John Forbes of said tract of land. (11) Said amended petition added as petitioner the heirs of John Innerarity and James Innerarity and named them as follows," etc. There is no affidavit attached to bill referred to on page 65 as a so-called bill of revivor, nor is it signed by any one of the parties to the original petition. "And that there is no bill of revivor pending, a final order having been made leaving no action to be taken by the defendant except upon the original or amended bill." This is followed on page 66 by a motion filed by the Appellant "to strike said amendment to bill from the files of this suit." "Which amendment introduces a large number of other individuals alleged to be the heirs of John Innerarity and James Innerarity." "Upon the ground that the same constitutes a new and wholly different suit, and upon the ground that the same was not instituted and filed within three years from the 10th day of June, A. D. 1872, as required by law." The Court denied this motion, whereupon the United States filed its answer hereinafter referred to.

The Record shows that since the 14th day of June, 1900, the numerous amendments thereto allowed or suggested by the court below are almost invariably for the benefit of new parties or so-called survivors, or "parties interested," whose names were inserted as parties through the agency of an alleged

amendment, which the United States contended was never in point of fact filed, but if filed it was after the limitation of the Act of June 10, 1872, that is to say after June 10, 1875.

The Act of 1860 allowed twelve years in which to bring an action, and the Act of 1872 extended that period three years. The heirs of John Forbes, Appellees, filed their petition March 3, 1875, only three months and one week before they would have been barred forever. This is the earliest date in the history of the case on which their claim appears to have been presented to the court, except in 1829, when James and John Innerarity claimed one-sixth each and added as co-parties, "the heirs of John Forbes." On the trial of their claim the United States filed its answer, which appears on the Record in this case and is a certified copy from the records of the Circuit Court of Escambia county, Florida.

On page 74 the answer of the United States to that suit appears inter alia as follows: "This respondent further answering says that the said James Innerarity and John Innerarity were *not* in the purchase or the grant of said land or otherwise *partners* of the said firm of John Forbes and Co.; said grant was not made to them, *nor have they any interest in the said grant of land.* And therefore they have no right of petitioning for the same;" and further, "that the said John Forbes before the filing of the said petition departed this life. If he had any heirs and legal representatives, such heirs and representatives should have been parties petitioners herein and ought not to have been named by their Christian and surnames, and not merely by the designation and name of heirs and legal representatives of John Forbes, deceased." The Act of May 23, 1828, in Section 8, provides: "And so much of the said Act as

requires the claimants to make adverse claimants parties to their suits, or to show the Court what adverse claimants there may be to the land claimed of the U. S. be also hereby repealed."

The answer of the United States filed in the present suit coincides substantially with the above answer.

On page 67 the United States says, "That heretofore, to wit, on the 2d day of December, in the year eighteen hundred and twenty eight, John Innerarity, whose descendants and heirs at law are named as complainants in the petition herein on behalf of John Forbes and Co., filed a petition before the Honorable Henry M. Brackenridge, Judge of the Superior Court for the Western District of Florida, for the recovery of the very same rights, claims and causes of action as in this petition now pending are sought to be recovered." And on the 24th day of March, 1829, the said John Innerarity and James Innerarity for themselves assuming partners of the firm of John Forbes and Co. and for the heirs and legal representatives of John Forbes deceased, "filed a further petition and amendment for the very same grant," and on page 69 "défendant further answering says that the court has not jurisdiction over the subject matter of this proceeding, because there is no statute or resolution or permission, general or special, authorizing the bringing of this proceeding to establish a claim for lands alleged to have been granted to John Forbes and Co. as set forth in the petition herein." This proves, first, that the heirs of John Forbes were not bona fide parties to the suit decided against the claim by Judge Brackenridge; second, that the amendment objected to by the United States on page 66 rendered the answer good in law provided the amendment is good in law.

In other words, it changed to something else in law the

petition from a prayer for the confirmation of the title to John Forbes in accordance with the expediente or the entire record with signatures, rubrics and flourishes including his petition and the decree of the Captain General bearing the seal of King Ferdinand VII, that "John Forbes, chief and principal partner of that house *by taking possession of it* will be able to benefit the province" and "ordering that the necessary evidence be given to the house of Forbes to place *him, John Forbes, in quiet* and *peaceful possession* of the *above mentioned land*," to a petition for the confirmation to parties who had not proved their title or their partnership and, second, who were barred by the statute of June 10, 1872. While the title was thus placed in John Forbes the government ordained that "a copy" be given to the house of Forbes and Co. as evidence that government had made and granted the petition of Forbes in settlement of his own and the firm's losses, leaving it to Forbes to make settlement with his partners, which it is to be presumed he did.

There is no evidence on the record that he did not make such settlement unless the bond for sixty-two thousand be so construed. And there is no evidence that the affidavit of the aged and infirm Madame Eugenie Olivie, vide Record, pp. 17, 33, 35, which gave away two-thirds of the entire claim to persons barred by the statutes had any knowledge whatever of said partnership. There is nothing on the record to show whether the other heirs ever had a chance to be heard on the subject. At least, Mr. McCabe furnished Mr. Dewhurst with nothing of the kind. Nor did he say whether Judge Settle, who "reserved to all other persons interested in the litigation to take such exceptions as they may be advised and saving to the

United States all rights and exceptions which may arise under the Stat. of Lim.'s," ever made an order on such exceptions, which it is reasonable to suppose were filed but not copied by Mr. McCabe because he was only looking for what would help his own side, namely L. N. Innerarity, of Baltimore. His testimony on this point is found on page 42 of the Record.

The United States, in its answer, says: "The *amended* petition * * * which is sought to be re-established *was not filed*, as the petition alleged," and on page 63 in its Plea says this amended petition constituted a separate and independent suit, and if "filed on the 14th day of December, 1878, as aforesaid, was not filed within three years from the 10th day of June, 1872," and prays for the dismissal of the bill.

On page 65 Complainants move to strike this plea from the files because inter alia "(21) It purports to be a plea to the bill called a bill of revivor, but is in fact a plea to the amendment to the original bill filed by leave of court, December 14, 1878."

III

The Decree

This is clear as to the confirmation of the grant but involved as to "persons interested." A modification is respectfully submitted.

The Court below in framing its decree dated December 5, 1904, confirming the validity of the grant (Record, p. 107 et seq.) names certain persons as "survivors of the persons named in the original and amended petitions" previously authorized by order of the Court to prosecute the suit for the benefit of all persons claiming the land under certain other persons. These

certain ones out of the original petitioners and certain others whose names appear in the re-established record as full-fledged parties to the suit, it is further decreed, "or such of them as are now living, are entitled to receive from the United States a patent for all the above described tract of land not sold or otherwise disposed of by the United States and entitled to enter any of the public lands of the United States liable to private entry at one dollar and a quarter per acre to an amount equal in extent to that which has been sold by the United States within the boundaries of the above described tract." And further to "hold the said lands patented hereunder and said rights to enter under this decree for the use and benefit" of the parties to the amended petition filed December 14, 1878, who would take two-thirds, and the parties to the original petition filed March 3, 1875, who might get what is left after the reserve for "all persons claiming any rights to said lands or said rights of entry under them or any of them and as to all matters of costs, counsel fees and other matters," according to further direction to carry a subsequent decree into effect.

The decree dated April 8, 1905 (Record, p. 117), confirming the report of the master appointed to ascertain the lands within the boundaries of the grant holds that the lands therein which are undisposed of under the land laws of the United States are the property not only of John Forbes, but also James Innerarity and John Innerarity, "who are parties to this suit." Further, "that the survivors of the petitioner in this suit," naming certain of the petitioners and their assigns, are entitled to receive from the United States a patent or patents for the lands last above described and are entitled to enter any of the public lands of the United States to the amount and extent of

one million one hundred and ninety thousand four hundred and ninety-five and 45/100 acres of said entry to be made in conformity to the requirements of the 6th section of the Act of Congress approved June 22, 1860."

Further, that they "shall hold said lands patented herein, and said rights to enter the public lands of the United States for the use and benefit of the legal representatives" of those named in the amended petition and original petition as in the decree of December 5, 1904. And further as to the unsurveyed land not perfected into title by the several entrymen and unpatented swamp lands and also "as to the respective undivided interests of the original petitioners and the heirs and legal representatives of such of the original petitioners as have died or may die before the termination of this suit and of all persons claiming any rights to said lands or said rights of entry under them or any of them, and as to all matters of costs, counsel fees and other matters of like nature this Court reserves to itself such further direction to carry this decree into effect according to the principles of the Act of Congress of June 22, 1860, and as may be necessary and as may be equitable and just. Done and ordered in open court this 8th day of April, A. D. 1905. James W. Locke, judge." Endorsed "final decree." "E. O. Locke, clerk."

That the decree of the court below need not be regarded as interlocutory is shown in the case of Bank, of Mobile, *vs.* Hall, 6 Ala., 141. There the court below held that as between two parties the complainants had the paramount equity and referred the cause to a master to state an account. On appeal the Supreme Court of the State held that the judgment was a final one as to the question, notwithstanding the reference to the

master, and denied a motion to dismiss the writ on the ground that the decree was merely interlocutory.

Although further direction by the Court below is contemplated and the persons entitled to the land and script are made *cestqui trustent* of certain of the parties to this suit but are not designated by name, it is not necessary for the Supreme Court to dismiss the above decree or remand it for modification below, because

First. The Act of Congress, approved June 22, 1860, under which the proceedings were instituted by the heirs of John Forbes on March 3, 1875, outlines the procedure to be followed and expressly directs that "the same shall be adjudged de novo in the Supreme Court as in other cases of appeal thereto in chancery and as equity and justice and the principles aforesaid may require." The Act of March 3, 1823, provides that "actual settlers at the time of cession shall not be required to produce in evidence the deraignment of title, when unable, when the title has been recognized by the Spanish Government."

The Act of February 8th, 1827, Sec. 2, confirms conflicting Spanish claims, "provided that nothing in the foreign sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed."

The Act of May 23d, 1828, Section 8, above referred to.

The Act of May 26th, 1830, Section 6, provides that all confirmations shall operate only as a relinquishment of the right of the United States.

The Act of June 23d, 1832, provides that "it shall be the duty of the Commissioner * * * upon the production of satisfactory proof of the death of the confirmee, or upon the

production of a regular chain of title from the confirmee to cause the patents to be issued to the heirs and legal representatives, or to the assignees of the confirmee, as the case may be."

Second. The right of a court of appeal to modify the decree of a lower court wherein the proceeding shall "conform to the practice of such Court in Chancery" is a distinct and settled rule of practice.

In 11 Encyclopedia of Pleading and Practice, p. 1068, citing numerous cases in States and United States Supreme Court the rule is expressed as follows: "An appellate court is vested with the amplest power to suit its judgment to the exigencies of each case that comes before it or to make its judgment effectively yield justice to the parties whose interests are involved. Accordingly an Appellate Court may modify or correct a judgment brought before it."

In Taylor on Procedure in Supreme Court, p. 717, it is said that where the facts are sufficiently before it the Supreme Court will render the decree that the court below should have rendered, and citing Penhallow *vs.* Doane, 3 Dall. 54, this rule is recognized in an admiralty case. In that case, at p. 107, it is held that the court is not under the same limitations as in a common law case. This can also be said of an appeal from the confirmation of a land grant, and especially where the Act compels the government to appeal.

In Stanley *vs.* Schwalby, 162 U. S., 255, 282, judgment had gone against the United States in trespass to try title to land. The Supreme Court considered the evidence, held that it was insufficient to sustain the judgment rendered and remanded the case (to the State court), with instruction to dismiss the

action against the United States. The case was tried without a jury, p. 265, and the Supreme Court of the United States held that this being so, the Supreme Court could render such judgment as should have been rendered by the court below, p. 282. The Court also decided: That the United States has and may assert a right, privilege, or immunity under the United States Constitution, which private parties could not have, that the dictum to the contrary in United States *vs.* Thompson, 93 U. S., 586, 588, is misleading.

That a judgment of a State court against the validity of an authority set up under the United States by defendants in an action of trespass to try title, so far as it necessarily involves the decision of a question of law, presents a question for review, by this Court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence:

That a decision based on insufficient evidence of a State in an action against its officers, that the United States had notice of a prior deed, and therefore had no title, and that judgment should be rendered against its officers for both title and possession, is a decision in a matter of law against the validity of the authority set up by them under the United States and is reviewable by this court:

That on reversing the judgment of the highest court of a State, the Supreme Court of the United States has power to instruct the State court to enter a judgment finally disposing of the case, instead of remanding it generally for further proceedings not inconsistent with the opinion of the Federal Court.

In City of Fort Scott Plaintiff in Error *vs.* Samuel G. Hickman, 112 U. S., p. 150, where a Circuit Court of the

United States, on the trial of an action at law before it, on the waiver of a jury, makes a special findings of facts, on all the issues raised by the pleadings, and gives an erroneous judgment thereon, which this Court reverses, it is proper for this Court to direct such judgment to be entered by the Circuit Court as the special finding requires.

In Cleveland Rolling Mill Company Plaintiff in Error *vs.* Charles D. Rhodes and Lizzie W. Bradley, Exrx. 121 U. S., p. 255, it is held that where it appears from the facts found by a Circuit Court of the United States, on the trial of a cause without a jury, that its judgment was erroneous, this Court may direct such judgments to be entered by that Court as its special findings require.

To the same effect in Meyer *vs.* Richards, 163 U. S., 415, this Court directed the entry of judgment for plaintiff for the value of Louisiana State Bonds. See the limitations prescribed in Egan *vs.* Hunt, 165 U. S., 189.

In the case of Jones *vs.* Williams, 108 Alabama, 282 (1895): A verdict was rendered for the plaintiff for a one-third interest in the land sued for. The judgment followed the verdict as to the recovery but ordered that a writ of possession issue for the land sued for, Held, that the error in this respect should be corrected by the Supreme Court without a reversal.

Durkee *vs.* Stringham, 8 Wisconsin, 1, quotes abundant authority for holding: That an appeal in chancery by one or more of several defendants or plaintiffs taken from the decree of the Court below generally and not from any collateral separate or distinct ruling, opens the whole case in the appellate Court for examination and for the reversal affirmation or such modification of the decree as the whole merits and equities of the case seem to require. The opinion in part follows: "The

first point that naturally presents itself is one of practice. Some of the appellees or Taylor, at least, as well as the appellant, Joseph Stringham, were satisfied with the decree of the Circuit Court, but neglected to take their appeal, supposing the appeal which was taken brought up the case for a rehearing in this Court, and necessarily opened the whole case for our consideration. But it is contended by the counsel for the appellant that this is a mistake, and that even if we should be of the opinion that the decree was not as favorable to Taylor as it should have been, still that we cannot modify or amend it to his advantage, he not having appealed. This question has been carefully considered in this case as well as in the case of Wood et al. *vs.* Spaulding, where the point was made and elaborately discussed by counsel.

In this case the appeal was from the whole decree while in the case of Wood *vs.* Spaulding the appeal was only from a part of the decree; and yet, in both cases we were led to the conclusion that the appeal to this Court opened the whole case, and that it was competent to modify the decree of the Court below and make it more favorable to the appellee, if the whole merits and equity of the case required that this should be done. The following are some of the authorities which, though not precisely in point, still have some bearing upon the question, and were considered in settling this rule of practice:

1 Tomlyn's Law Dict. Appeal; 1 Spencer's Eq. Jurs., 393, chap. 10; 2 Daniels, ch. Proc., 1222; 3 Id. 1602, 1628 to 1632; Hill *vs.* Chapman, 1 Sumners Vesey, 405, Note A; Consequa *vs.* Fauning, 3 John C. R. 587; Glover *vs.* Hodges, 1 Saxton, N. J. 113, R. S. chap. 84, 112.

More time might be spent in the examination of the question were it not since the adoption of the code it has no practi-

cal importance whatever, and therefore it will be dismissed without further remark."

Wickliffe *vs.* Owings, 17 Howard, 47, was a bill to quiet title. The Circuit Court dismissed the bill, but the Supreme Court rendered such decree in complainant's favor as the Circuit Court should have rendered.

In Becknell *vs.* Comstock, 112 U. S., 150, the Supreme Court examined the agreed facts and reversed the Court below with direction to enter judgment for defendant.

See also Elizabeth *vs.* Nicholson Paving Co., 131 U. S.:

Born *vs.* Schrenkeisen, 110 N. Y., 55. In that case a defendant below was given judgment in his favor. Upon the terms of the instrument sued on, the plaintiff should have recovered. The defendant, however, averred facts entitled him to reformation of the contract, and to judgment in favor on the contract reformed; but he omitted to pray for the reformation. The Court below gave him judgment, but did not order the reformation. On appeal, as all the elements of reformation appeared of record, the Supreme Court affirmed the judgment with the modification that it granted the reformation:

Clarke *vs.* State, 8 Gill J. (Md.) 111. Inadmissible evidence had been received at the trial below, offered by plaintiff. The verdict had gone in his favor. The verdict was sustained, however, by clear and undoubted evidence; and the inadmissible evidence was so clearly irrelevant that it could not have misled the jury. For the error in its admission, therefore, the S. C. refused to reverse:

Feder *vs.* Field, 117 Ind. 386. While cross errors may be assigned, the Court is not bound to consider them in every instance; but where the entire record and all the parties are

properly before the Court, the appellee will be awarded affirmative relief if he is entitled to it:

Patoka T. p. *vs.* Hopkins, 131 Ind., 142: "It is a mistake to suppose that an appellee who properly saves a question, and duly presents it by the assignment of cross errors, is not entitled to affirmative relief."

Ryan *vs.* Fitzgerald, 87 Cal., 345. In replevin, where defendant did not give security, the presumption on appeal is that the property was all delivered by the sheriff to the plaintiff: and on verdict and judgment for the plaintiff for *a part only* of the property, the Supreme Court will modify the judgment so as to require the return of the residue to the defendant. So modified, the judgment was affirmed.

Striking out the name of a party on appeal was ordered in the following cases:

Savage *vs.* Walshe, 26 Ala., 619: Judgment must be regarded as affecting only persons before the Court; the entry of judgment against one of the parties, who, as the record shows was not served and did not appear, is a mere clerical mistake.

Browner *vs.* Davis, 15 Cal., 9. Where judgment entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the S. C. or below, on motion.

Cruchon *vs.* Brown, 57 Mo., 38. Same.

Mitchell *vs.* Bridges, 113 N. Car., 63. "In looking over the entire record we have been able to discover but one error on the part of the Court. The defendant, * * * and Thomas Bridges, asked the Court to instruct the jury that there was no evidence that they had ever cut any timber or

otherwise trespassed upon the land. This instruction was refused, and, as we can find no such evidence on the record, we must hold that there was error in the refusal. As these defendants do not claim the land, and are only concerned about the judgment against them for the damages assessed by the jury, the erroneous ruling will not necessitate a new trial, but may be corrected by striking the names of these parties from the judgment. Modified and affirmed."

The decree should be modified by striking out so much thereof as attempts to specify present owners or those entitled in any way to anything from them and merely confirm the grant as against the United States and in accordance with the Spanish expediente or patent which consisted of the petition of John Forbes, the decree of Captain General Cienfuegios, the particulars of the claim and the signatures and rubrics of the authorized officials.

This modification is required for the following reasons:

I. It is reasonable to suppose that Congress intended to authorize decrees upon the validity per se of deeds or grants made by a government formerly in possession. In truth there is a provision in the act of Congress approved February 8, 1827, indicative of this intention. That act provides in Section 2, confirming conflicting Spanish claims reported in pursuance of the Act of May 8, 1822, "That nothing in the foregoing sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed."

And although, as was said by Mr. Justice Bradley in one of his luminous opinions quoted in part in this brief, that the old decisions do not apply and the same may be said of the Acts of Congress prior to June 22, 1860, yet the principle embodied in that provision of the Act of 1827 is a good one, not repugnant

to the spirit of the later Act and especially applicable in this case.

In the present case the Court below having decided the grant valid, if the Supreme Court affirms that decision as against the United States and in accordance with the petition of John Forbes and the decrees of Cienfuego and applying the Acts of June 22, 1860, and June 10, 1872, confirms the title to the heirs of Forbes, who, it is humbly submitted are the only parties appearing on the record entitled to recover the land and script, then any person having equitable interest or right of contribution, whether mentioned in the decree of the judge below or not, may file his bill in the proper Court nearest the lands and prove his claim.

This, it is submitted, will separate the abstract question of right and the concrete one of persons in a manner best calculated to serve the ends of justice.

Therefore, for the reasons herein stated, it is submitted that the grant should be confirmed.

HENRY R. HATFIELD,
Counsel for the Heirs of John Forbes.

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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 69.

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At the time of receiving the printed brief for the appellant, our former brief was, except as to the last few pages, in print, and the type distributed, so that the matter in this brief could not be included therein.

In the absence of that brief and of a knowledge of what assignments of error would be insisted upon by appellant, we have discussed many questions which the appellant has not broached nor argued, and the Court is relieved of a consideration of them. Such are our discussions of the first assignment of error, (Pages 9 to 15 of our former brief,) of the second assignment of error on pages 16 to 29, (except sub-division 4 of our discussion, on pages 17 to 21,) and of the third assignment of error (Pages 29 to 31, inclusive,) which the Court need not consider.

For the further convenience of the Court, we group our discussions in our former brief of the points which are argued by appellant in the same manner in which it groups its points and we add further answers to them.

I.

The amendments to the original petition did not make different causes of action barred, by the limitation of the Act of 1860, as extended by the Act of 1875.

The appellant, under this head, attacks two amendments allowed by the Court below, to-wit:

A. The amendment filed December 14, 1878, (Transcript, 15 to 18,) making the heirs of James Innerarity and John Innerarity parties, and

B. The amendment at the final hearing (May 25, 1904, Transcript, p. 106,) made by stating the reliance of the petitioners on the grant made February 20, 1818, and altered so as to purport to have been made on January 10, 1818.

A. We have discussed this at length in our discussion of the fourth assignment. (Pages 31 to 50 of our former brief.)

We therein showed:

That the order, being an order allowing an amendment, will not be reviewed by this Court. (Page 32.)

That the change from a reliance upon a grant alleged to have been made to John Forbes to a reliance upon a grant alleged to have been made to John Forbes & Company was not a change of the cause of action. (Pages 33 and 34, inclusive.)

That the introduction, by amendment, of the Innerarity heirs, who were co-tenants of John Forbes' heirs and interested in the same land and the same question, was not a change of the cause of action and was permissible. (Pages 34 to 44, inclusive.)

That this Court has frequently ruled that parties situated as were John Forbes' heirs in this case could procure a decree in their own favor and in favor of other persons interested in the property and title, upon general principles, and because the United States is concerned only in the question as whether the lands were segregated by Spain from the public domain and not in the "contest between persons claiming *ex post facto* the grant." (Page 35, bottom, pages 36 to 39, inclusive)

That, in fact, the amendment was unnecessary, because the relief could have been granted without it and hence, of course, it did not create a new cause of action. (Pages *supra* and page 39, bottom, and 40 and 42,) and

That these amendments, creating no new cause of action, it was, of course, immaterial whether they were made before or after the limitation had expired. (Page 42, bottom, pages 43 to 50, inclusive.)

The decisions of this Court, cited and quoted in the pages of our brief above enumerated, are particularly strong in favor of our contention.

As against this wealth of authority, the appellant relies upon three cases;

Gray vs. Trapnell, *et. al.*, 23 Ark., 512;
United States vs. Heirs of Innerarity, 19 Wall., 595;
United States vs. Watkins, 7 Otto, 219.

We have not access to the first case, but if it decides, as it seems to do, that a tenant in common cannot recover from a stranger the whole interest in land in controversy and hold for his co-tenants, then it is opposed to the great weight of authority, (Pages 41 and 42, our former brief.)

Davison vs. Wallingford, 88 Tex., 619; 32 S. W. Rep. 1030;
Foster, *et. al.*, vs. Hackett, 112 N. C., 546; 17 S. E. Rep. 426;
7 Ballard on Real Property, Sec. 826;
Note, 50 Am. State Rep. pp. 841, *et. seq.*

And approved by this Court, so far as it could approve a purely local question.

Hardy vs. Johnson, 1 Wall., 371.

And evidently would be approved by the Supreme Court of Florida, where the land lies.

Simmons vs. Spratt, 26 Fla., 461.

In the second case there was no connection between the original petitioner, who had no title, and the attempted intervener, who did not file claim in time. That is to say, the person who finally sought confirmation was an interloper, showing no right connected with the original petitioner. Here, upon the contrary, as we have shown, the petitioners could have been held as Trustees for their co-tenants, and thus the whole land was in controversy from the beginning. The quotation by the appellant, (P 16 of its brief,) shows plainly the position of this Court on that subject, while its position upon a case like the one at bar is shown with clearness by the decisions cited on pages 36, 37 and 38 of our brief.

In the third case, Mrs. Simpson had no standing in Court, because she had parted with her undivided interest. The claim of the Innerarities had been already rejected. If Mrs. Simpson had retained her interest, there could be no doubt that under the authority of the cases which we

have cited, and particularly of United States vs. Morant, 123 U. S., 343, the title could have been confirmed in the Watkins heirs for themselves and for her.

b. This Court will not reverse because of the allowance by the Court below of the amendment at the hearing so that the petitioners might state a reliance upon the grant made on February 20, 1818, and altered so as to purport to have been made on January 10, 1818.

We have heretofore discussed this at large in our former brief, under the fifth assignment of error. (pp. 50-70 inclusive.)

We therein showed,

a. That the order of the Judge permitting the amendment is not reviewable here, since it is the ordinary case of amendment at the hearing of a bill in chancery to meet the proof. (Paragraph a, p. 81;)

b. That there was no objection or exception by the United States to the allowance by the Court of this amendment, but on the contrary, the allowance was procured by the defendant, (pp. 51 and 52;)

c. That if the defendant, the United States, had at any time a right to object to the allowance of the amendment, it waived it by pleading over. (p. 52;)

d. That even without the amendment the difference in the date of the grant pleaded and the one in proof would not have been a variance preventing a recovery upon the original grant in proof. (pp. 52-60;)

e. That if it would otherwise have been a variance, none can be insisted upon by the United States, for not only did it not object to the introduction of the grant, but it itself introduced it. (p, 60;)

f. That a variance does not prevent a recovery, unless a defendant has been misled and a fair trial prevented. (pp. 60 and 61;)

g. That no new cause of action is introduced by the defendant, and hence it related back to the filing of the petition, and the limitation did not bar a reliance upon the grant contained in it. (*Passim*, pp. 52-61;)

The appellant has nothing to oppose to this, except the assertion that the change from the original petition created a new cause of action, barred by the limitation of the Acts of 1860 and 1872, and the citation of the cases of

Union Pac. R. R. Co. vs. Weyler, 158 U. S., 285; and,
Kendall vs. United States, 107 U. S., 123.

The latter case does not bear at all upon this, and the former is, so far as the point involved is affected, only a declaration of the general doctrine which tend as much to support our contention as that of the appellant, since it expressly recognizes the Law to be that an amendment which does not introduce a cause of action "different from that originally asserted," does not introduce a new cause of action.

Nor does the case of Sicard vs. Davis, 6 Peters, 124, cited in the latter case, bear on this. In that case, there was an amendment changing the demise relied upon in the original petition. The effect of this was to deraign the title from persons other than those from whom it was deraigned in the original petition, and there was thus an abandonment of the title originally relied upon, and the assertion of, as said by the Court, "a demise from a different party asserting a different title."

It is not so in this case, however, for here the same grant from the same grantor, covering the same property, is the foundation of the petitioners' claim throughout the whole proceedings, and the only change is, the change of the date of the making of the grant. Instead of being within the case of Sicard vs. Davis, *supra*, this case is within,

Blackwell vs. Patton, 7 Cranch, 471,

where an amendment altering the date of a demise in ejectment was allowed.

II.

This claim is not barred by the former adjudication made by Judge Brackenridge, under the Act of May 23, 1828.

We have already discussed this, (pp. 72-79, inclusive, of our former brief.)

We therein showed that Judge Brackenridge having decided that the grant was made after January 24, 1818, had no jurisdiction to decide anything further. (pp. 73 and 74;)

That he did not attempt to decide anything further than this, (pp. 75 and 76;) and,

That his decision was upon the rights of the parties as they then existed, under the Treaty of 1819, and could not be a bar to the assertion of a right under the Act of 1860, and that this resulted from

The general law of estoppel. (pp. 76 and 77;)

Decisions upon the Statute directly in point, but not relating to Florida lands, (pp. 77 and 78,) and;

Decisions under this Act, especially as to Florida lands, (pp. 78 and 79.)

In answer to this the appellant seems to contend,

1. That Judge Brackenridge decided the grant to be null and void because altered, and that the Act of 1860 did not rehabilitate it after such decision.

2. That Judge Brackenridge had authority to decide that the alterations avoided the grant, because the Act of 1860 conferring authority upon him, required him, "by a final decree to settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty," etc., and

3. That the same Act required the claimants presenting the claim "to particularly state the date of the grant, concession, etc:" that the claim in this case stated the grant to be of date, February 10, 1818, and thus asserted it to be a grant not annulled, and that hence, the decision of the Judge was not because of the annulment by the treaty, but because of the voidness of the grant by reason of the alterations in it.

1. We have already discussed the question whether Judge Brackenridge did decide the grant to be void because of the alterations in it. (pp, 106-108, former brief.)

We have but to add that the pertinency of the ascertainment of whether he decided the grant to be null by reason of its alterations is because of the plea of estoppel by appellant setting forth that the judgment of Judge Brackenridge was a rejection "upon the merits and not otherwise," and that "the claim and cause of petition so finally adjudicated was the same claim, title and cause of petition as that whereon the present petitioner have founded their petition and no other."

But the appellant cannot show under the principle of estoppel by judgment, that there was any adjudication by Judge Brackenridge that the grant was void because

of alterations in it such as to estop upon that ground any subsequent attempt to assert rights under it, for,

In order that an estoppel as to any point decided by a judgment may arise, it must appear that a decision of that point was necessary for the making of the judgment.

Packet Co. vs Sickles, 5 Wall., 592.

Here it cannot be contended that a decision upon the effect of the alterations was necessary to the rejection of the grant, since there was patent upon the face of the case as it then stood, and was in the mind and opinion of the Court, the fact that the grant, whether otherwise valid or invalid, was not made before January 24, 1818, and that a decision on this ground must be had without reference to any other ground.

But even if a decision on the nullity of the grant because of alteration was one which could have been made contemporaneously with the decision that the grant was invalid because made after January 24, 1818, yet, in order that there may be an estoppel because of such decision as to the effect of the alterations, it must clearly appear that the decision was upon that ground, for,

"If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel when pleaded, and nothing conclusive in it when offered as evidence."

Russell vs. Place, 94 U. S., 610;

Fabey vs. Esterly, etc., Co., 3 N. Dak., 223: 55 N. W., 581.

And one who pleads an estoppel by judgment which might have proceeded on two or more facts, must prove that it was decided on the particular fact as to which he seeks to assert the estoppel.

Zoeller vs. Rilet, 100 N. Y., 107;

Louis vs. Ocean, etc., Co., 125 N. Y., 348: 26 N. E., 303;

Dygert vs. Dygert, 4 Ind. App., 280: 29 N. E., 491.

In this case it is impossible for anyone to say that the court rejected the petition upon the ground of the alterations of the grant instead of upon the ground of the want of jurisdiction of the Court to confirm any grant made after the date fixed in the Treaty. The mind of this Court cannot rest with any certainty of conviction upon the idea

that the court below rejected the claim as (*i. e.,*) because fraudulent, when there exists upon the face of the opinion of the Judge another and adequate reason, one which would compel such a decision, that is, the annulment by the Treaty and the prohibition of the act of 1828 against the Court's taking any cognizance of any claim annulled by it.

2. We do not comprehend, and, therefore, do not undertake to answer this contention. Clearly, the direction of the act of 1828 as to the making of final decree and adjudication had reference only to those claims of which the court might have jurisdiction, and had no reference to those of which it had no jurisdictlon. Nor was the right to adjudge the merits of claims of which it had no jurisdiction, attempted to be conferred.

3. Nor is this contention clearer. Appellant's idea seems to be that because the grant was stated in the petition before Judge Brackenridge to have been made on January 10, 1818, therefore, the court was compelled to accept that date as the true date, and to pass upon the genuineness of a grant of that date and could not adjudicate that the grant had been made after the time permitted by the treaty, even though that fact appeared in evidence.

Why not? The protection of the United States in its rights under the Treaty was not only the duty of the District Attorney in his conduct of the case, but was the duty of the Court. A Court will decline jurisdiction where it appears that it has it not, whether the suggestion be made by a litigant or whether it arises in the mind of the court itself.

Besides, the defendant, the United States, in that suit expressly denied "the truth of all the statements and matters of fact in the said documents asserted and set forth," (Tr. p. 75,) (the documents being the grant relied on and the statements relating thereto,) and expressly refused to admit the execution of the grant and title papers. (Tr. p. 74.)

On this issue, the trial was had. The petitioners, in order to sustain their case, which required a showing of the date of the grant to be before January 24. 1818, and thus the jurisdiction of the court, introduced an exemplification. To meet this, the defendant introduced the Registro, which showed the date to be February 20, 1818, and, therefore,

showed the court to have no jurisdiction. There was no reason and no room for adjudication upon the effect of the alterations, for in the face of the patent want of jurisdiction of the court, it is clear that rejection was because of that want of jurisdiction.

III.

This Act of June 22, 1860, as extended by the Act of June 10, 1875, does authorize the confirmation of a grant of lands in Florida, East of the Perdido River, made after January 24, 1818.

This proposition is the reverse of the proposition of the appellant. (See its brief, p. 34)

We have already discussed this matter, (pp. 94 to 105, inclusive, our former brief.)

We will not follow the long and interesting history in that portion of appellant's brief, but content ourselves with a review of the statement and argument to support it.

The first of these is that the Act of 1860 does not apply to grants of land

East of the Perdido River
Made after January 24, 1818.

The appellant, however, admits that the Act did apply to lands in Florida, East of the Perdido River, for its counsel say (pp. 53 and 54 of their brief:) "It is not contended that enforceable claims are confined to those in the disputed territory—the territory between the Mississippi and the Perdido."

The admission, however, was not needed, for the Act expressly extends to lands "lying within the States of Florida," etc., and the State of Florida lay and lies entirely East of the Perdido River and outside of the disputed territory.

The only thing left, then, is the inquiry as to whether the Act of 1860 is intended to embrace grants made after the date fixed in the treaty, to-wit; January 24, 1818.

The language of the Act is express that it related to all grants "bearing date prior to the cession to the United

States of the territory out of which said States were formed, or during the period when any such [foreign] Government claimed sovereignty, or had the actual possession of the district or territory in which the lands so claimed are situated." Applying this to Florida and eliminating the question of grants made after a cession, but while the ceding sovereignty was in possession, it is clear that all grants made prior to the cession—the date of the treaty, Feb. 22, 1819,—were included in the Act. The grant in question was made before that time and, hence, it is included.

In our opinion the very purpose of the Act was to embrace grants in Florida made up to the time of an actual transfer of possession. Evidently and admittedly (p. 16, appellant's brief,) that was the purpose as to lands in the disputed territory, and there is no hint in the Act of 1860 of the application of a rule to the lands in the State of Florida different from the rule to be applied to lands in the disputed territory.

There were in 1860, probably, no grants in Florida, except those made after January 24, 1818, which had not been presented to the Commissioners or Courts and adjudicated, for Congress had passed act after act for decades giving the opportunity to grantees to have grants made before Jan. 1, 1824, presented and confirmed, and claimants must have availed themselves of these acts in all cases where they could do so, but the terms of the treaty and of the acts relating to Florida following it were so explicit in excluding grants made after January 24, 1818, that probably none had been presented, and certainly none had been confirmed, and it was this class of grants that the Act of 1860 was passed to relieve.

However this may be, the language of the Act is too plain for controversy and the decisions of this Court construing it, (pp. 90 to 105 of our former brief,) are too explicit to admit of doubt, especially the decision in the case of United States vs. Morant, 123 U. S , 335, upon this very class of claims.

Counsel for appellant say (p. 54 of their brief) that the act was intended to give relief to claims in the territory East of the Perdido "resting upon the same or similar circumstances" as those in the disputed territory. They fail to point out, however, any dissimilarity in the two

classes of claims, or any design in Congress to make a dissimilarity any basis for discrimination. In fact, as we have shown on page 101 of our former brief, the general principle upon which Congress was desirous of relieving both classes of claims was exactly the same; that is to say, since in the case of the disputed territory, because of the want of title in the sovereign, and in the case of Florida, because of the treaty obligation of the sovereign, and in both cases because of adverse legislation of Congress the titles were not enforceable, it was thought equitable and right that they should be made enforceable.

Counsel answer their question, "what is the character of claim intended to be sustained by this Act," by saying that the claim must rest "upon some right, not necessarily legal, but at least equitable, which imposes an honorable or moral obligation upon the present Government to recognize it." This, at best, furnishes a very loose foundation upon which to argue, but as applied to the two classes of cases under consideration, it must be clear that if there be any difference in the obligation of the United States Government, the weight of the obligation must be in favor of Florida claimants who, like the claimants in this case, for valuable considerations, received perfected grants from a sovereign which had the power to grant and whose claims were afterwards arbitrarily annulled by that sovereign, and not in favor of claimants in the disputed territory who derived from a sovereign who had already divested himself of his sovereignty and of the power to make grants, such claimants being in many cases mere gratuitous grantees, without any present or past consideration passing from them to the sovereign.

It is also said by counsel for appellant that if it be held that this grant is covered by the terms of the Act of 1860, it must also be held that the grants of Punon Rostro, deVargas and Alaron are covered by the terms of the act.

This does not necessarily follow, for the reason that the ratification by the King which, of course, became a part of the treaty, expressly excepts these grants by name, and the rule is established that a general reference, such as is found in the Act of 1860, will not include particulars such as are found in the ratification of the

treaty by the King of Spain. The grant in question here is not specified in the treaty, but came within the general exceptions which are clearly embraced within the language and spirit of the Act of 1860.

It was understood between the contracting parties at the time that only the three grants expressly named in the ratification were intended to be annulled. President Monroe, in his message sent to Congress on December 7, 1819, says, "It will be seen by the documents transmitted herewith that the declaration (ratification) mentioned, relates to a clause in the eighth article concerning certain grants of land recently made by his Catholic Majesty in Florida, which it is understood had conveyed all the lands which until then were ungranted. It was the intention of the parties to annul these latter grants, and that clause was drawn for that express purpose and none other."

Besides this, even though the results suggested by the counsel would be reached, yet that consideration would not justify this Court in disregarding the plain language of the statute, the circumstances under which it was passed, the classes of cases which it was intended to cover, and in failing to give any meaning whatever to the provisions of the act so far as the lands in Florida are concerned.

IV.

The petitioners are within the provisions of the Act of 1860.

This statement is in answer to the statement of counsel for appellant on page 69 of their brief that the petitioners are not within the provisions of this act. Under this they contend that Judge Brackenridge rejected this claim, that he was a public officer, and that such rejection by him bars the Court, under the Act of 1860, from a consideration of the claim.

We have discussed this fully on pages 105 to 108 of our former brief and need not further discuss it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 69.

UNITED STATES, APPELLANT,

vs.

THEODORE DALCOUR ET AL., APPELLEES.

ADDITIONAL BRIEF FOR APPELLEES.

The United States suggests, rather than argues, that the grant in question was not valid because the whole territory had already been covered by a grant to Rostro. The answers to this are:

1. The general grant to the count of Puñon Rostro on February 6, 1818, does not impair the validity of the title made to Forbes & Company by Cienfuegos, February 20, 1818. By the terms the grant to Rostro was a general grant, without injury to a third party. (See list of grants annulled by the treaty of 1819, pages 68 to 71, Laws of United States Respecting Public Lands, Gales & Seaton, 1828.)

A general grant, without injury to a third party, does not

prevent a specific grant within the limits, though subsequent in date.

Fremont *vs.* United States, 17 How., 558 (15-247).
Henshaw *vs.* Bissell, 18 Wall., 255.
Ledoux *vs.* Black, 18 How., 475 (16-457).
Waterman *vs.* Smith, 13 Cal., 407.
Miller *vs.* Dale, 92 U. S., 473 (23-735).
United States *vs.* Armijo, 5 Wall., 445 (18-492).

In the Case in 17 Howard, Chief Justice Taney says:

"It is true that if any other person within the limits where the quantity granted to Alvorado was to be located had afterwards obtained a grant from the Government by specific boundaries before Alvorado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey to Alvorado; as between the individual claimants the title of the party who had obtained a grant of the specific lands would be the superior and better one."

The court says that grant to Alvorado was positive and plain and conveyed to him a present and immediate interest.

So the grant to Rostro may have been of a present interest, but it was general in terms, being "all the waste lands not heretofore ceded in Florida," between the Gulf of Mexico and the United States, the Perdido and St. John's rivers. Rostro's grant or concession was canceled by resolution of the Cortes October 5, 1820, with the grantee's assent, he receiving as indemnity a large grant of Crown lands of Spain. A better reason why the concession to Rostro did not prevent the King's deputy from indemnifying Forbes & Co. with the grant of lands in West Florida in February, 1818, is that Rostro's grant, emanating from the King, was upon terms and was not a complete title. In his letter, dated Washington, November 16, 1818, Don Luis de Onis, Envoy of Spain, declares that the late grants made by the King were made with a view to promote population and cultivation, and that

in consideration of the grantees not having complied with the essential conditions of the cession, as has been the fact, *they may be declared null and void* (page 26, Message from the President to Congress, December 7, 1819, 1 Executive Papers, 1 Session, 16 Congress, 1819-1820).

2. This grant made to Rostro was a grant upon condition, and the right to perfect it by the performance of the conditions made the title in Forbes & Company perfect, even though it had been, up to the time of the failure to perform conditions by Rostro, subordinate to the title granted to Rostro.

2.

We regret to be compelled to advert to a brief filed on October 29, 1906, purporting to be a brief on behalf of the Forbes heirs.

We suggest, with modesty, that it adds nothing to the discussion of our brief already filed, so far as the merits are concerned, and that the sole purpose of it is to ask this court to ignore the claims of the heirs of John Innerarity and James Innerarity and to confirm the grant in question to the Forbes heirs alone.

We submit as conclusive answers to this suggestion and request:

1. That the undersigned attorneys represent a portion of the Forbes heirs and, as they believe, the larger portion, and that those represented by them do not join in the request made in the brief mentioned; so that the court has before it only a request of an indefinite number, of what appears to be upon the record a one-third interest, asking that the wishes of a portion of that one-third and the interests of the whole of the other two-thirds shall be ignored.

2. That we have already shown in our former briefs that the Innerarity heirs were properly made parties to the proceeding and are entitled to share in the land and scrip to be awarded by the court, if the claim be adjudged valid by this court.

3. That the suggestion made in the brief, that there is no proof of the interest of the Innerarities and of the heirship of those persons purporting to represent them, is without merit. As to both of these matters, they stand upon exactly the same footing as the Forbes heirs, for as to each there is no proof. So far as the interests of John Forbes and of his copartners are concerned, they are both covered by and recognized in the grant itself, and his interest is no more entitled to protection than theirs. So far as proof of the heirship of the present claimants is concerned, it has been made, both as to the Forbes heirs and as to the Innerarities, only by the failure of the United States to deny and by its admission, to be found in the first paragraph of its answer, on pages 67 and 68 of the transcript, in which it is expressly admitted that the complainants, including the Forbes heirs and the Innerarity heirs, are the heirs and legal representatives of Forbes and the Innerarities respectively. Indeed the assertion of interest of the persons claiming under the Forbes heirs is not as well sustained as the interests of the Innerarities, since the assertion of the interest of the former is contained only in the petition filed by Alex. T. Steele, shown on pages 7 to 15 of the transcript, while the interests of the Innerarities are set forth on oath by one of the Forbes heirs. (See pages 15 to 17, Transcript).

4. That the heirs of Forbes and the heirs of Innerarity have been in accord in asserting and maintaining this claim for over thirty years, and not only has it been recognized by the Forbes heirs, as aforesaid, that the Innerarities were

interested largely in the claim, but side by side they have worked to the final end of obtaining a decree in the lower court; but not until the filing of the brief mentioned, on October 29, 1906, has there been a hint upon the record that it was not the desire of all the parties that the decree of the lower court should be affirmed as it stood, and that the respective rights of the parties as fixed in that decree, and as acted upon and acquiesced in by all of them for more than a quarter of a century, should be the permanent rights to be adjudicated by this court.

5. That to carry out the suggestion of the brief mentioned would be to allow all the Forbes heirs to avail themselves of the expenditure of the time and money of some of their number and of the Innerarities for three decades, without furnishing any equivalent therefor. The latter as much as the former have, through their various attorneys, prosecuted the suit, re-established the record, filed all pleadings, taken all evidence, and conducted every step; and yet the prayer of the brief is that these efforts shall be entirely disregarded and the fruit of them reaped by those who have not contributed at all.

6. That it would be unconscionable for the Forbes heirs to take the benefit of the decree rendered in the court below without its corresponding burdens. As to them, it is an entirety. They have not appealed and are in no position to ask the court to modify the decree. Admitting that it is within the power of the court to make such modification if it sees clearly that the rules of law or the principles of justice require, it is respectfully submitted that to make such modification in this case would be in violation of the rights of some of the parties, as shown by the record, and not required by the necessities of the case nor by any principle of justice apparent to us.

7. We respectfully submit that the equities may be fully settled in the district court upon affirmance of its decree, wherein that court reserved jurisdiction to carry its decree into effect (Record, pp. 131, 132).

Respectfully submitted,

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Attorneys for Appellees.

Supreme Court of the United States.

No. 69.—October Term, 1906.

The United States, Appellant, *vs.* Theodore Dalcour et al., Heirs of John Forbes, deceased, et al.	Appeal from the District Court of the United States for the Southern District of Florida.

[December 3, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition to establish title by a grant of about one million eight hundred and fifty thousand acres of land in Florida, brought in the District Court under the Act of June 22, 1860, c. 188, § 11, (12 Stat. 85, 87,) extended by Act of June 10, 1872, c. 421, (17 Stat. 378,) for three years from the last date. The petitioners had a decree in the District Court and the United States appealed to this Court under the abovementioned § 11.

As the jurisdiction of this Court is denied, we will dispose of that question before going further into the facts. The ground of the denial is that by § 6 of the Act of March 3, 1891, c. 517, the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Courts, &c., in all cases other than those provided for in the preceding section, "unless otherwise provided by law." There is no doubt that this enactment was intended to supersede previous general provisions, and to establish in what cases and to what Courts appeals might be taken from the District Courts. *The Paquete Habana*, 175 U. S. 677, 686. But the statute recognizes, in addition to the exceptions which it enumerates, others where it is "otherwise provided by law." These words must be taken to refer to existing provisions and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the Act would fail of its purpose. But they save some. There is no case to which they can apply more clearly than one in which, by reason of its interest, the United States has manifested its will to submit to no judgment not sanctioned by its highest Court. The language of § 11 is not the usual permission to appeal, such as existed in the Act of March 3, 1851, c. 41, §§ 9, 10, (9 Stat. 632, 633,) referred to in *Gwin* v. *United States*, 184 U. S. 669. See also Act of August 31, 1852, c. 108, § 12, (10 Stat. 99.) It bears the unusual form of a positive requirement. "If the decree be against the United States, an appeal shall be

entered to the Supreme Court of the United States." This is a provision based on a specific policy with regard to a certain class of claims. It is not a matter of general principle but a special trust. See also Act of May 23, 1828, c. 70, § 9, (4 Stat. 284, 286,) May 26, 1824, c. 173, § 9, (4 Stat. 55.) It stands on the same ground of peculiar importance that is the foundation of the express grant of certain direct appeals in § 5 of the Act of 1891. Therefore, without considering whether the case at bar falls within the other exceptions, we are of opinion that the jurisdiction of this Court given by § 11 of the Act of 1860 remains unchanged.

The petition was filed on March 3, 1875, by the heirs of John Forbes. It alleged a grant to John Forbes by the Captain General of Cuba, on January 10, 1818, that is, a grant made in time to escape the eighth article of the treaty with Spain, of February 22, 1819, declaring all such grants made after January 24, 1818, void. On the other hand, it invoked the earlier part of the same article, by which all grants made by the King of Spain or by his lawful authorities, in the territories ceded to the United States, before January 24 were to be confirmed to the same extent as if the territories had not been sold. On December 14, 1878, an amendment was allowed, by which the grant was alleged to have been made to John Forbes and Company, a partnership consisting of Forbes, James Innerarity and John Innerarity, and the Innerarity heirs were joined as parties. The rights of the United States, especially under the statute of limitations, were saved, and one question argued is whether this amendment could be allowed, when the time for bringing suit under the act of 1860 had expired. We shall not find it necessary to discuss this question, and shall assume for the purposes of decision that the amendment properly was allowed. *United States* v. *Morant*, 123 U. S. 335, 343. We shall assume that the proceeding is to establish the claim and appropriate the land to it, rather than to determine in detail the present holders of the claim. See *Butler* v. *Goreley*, 146 U. S. 308, 309, 310. s. c. 147 Mass. 8, 12. *Pam-To-Pee* v. *United States*, 187 U. S. 371, 379, 380.

It is unnecessary to trace all the vicissitudes of the case or to explain the delays. It is enough for our purposes to say that the parties reached an issue on May 29, 1903. A master was appointed and testimony was taken. At the hearing before him the United States put in the registro, or instrument of grant, which was in fact the original instrument, although the document of title under Spanish law is a copy delivered to the grantee, while the registro is retained by the government. It appeared upon inspection that this instrument had been altered in the date to January 10, from February 20, 1818, the true date making the grant void under the treaty. Thereupon the petitioners asked leave to amend by adding an allegation that the grant was made on February 20,

1818, but had been altered so that it purported to have been made on January 10. The result of this amendment was that whereas the ground of recovery previously had been the treaty, now it was that the Act of 1860 had given a right to recover in a case which the treaty put an end to in so many words. It abandoned the old ground, and that no longer could be relied upon if the amendment was allowed. The amendment, although filed, was not formally allowed before the hearing, and after the hearing the United States filed a suggestion that it had been treated as allowed and that an order should be made *nunc pro tunc* that the amendment had been allowed. Thereupon the order suggested was made, and an additional answer was filed setting up the treaty and the limitation in the statutes. We do not perceive that the United States, by its course, lost its right to maintain that the amendment set up a new cause of action which was barred by the limitation fixed by the statutes on the matter, and it urges that defence. *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285, 298.

It has been decided that a decree upon a bill to have a patent declared void as forfeited under an Act of Congress was a bar to a subsequent bill for the same purpose upon the different ground that the land was excepted from the grant as an Indian reservation. *United States* v. *California & Oregon Land Co.*, 192 U. S. 355. In that case it was intimated that in general a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*. But while such a decision might be persuasive on the question whether the cause of action is the same or different for the purposes of amendment, it has been decided that an amendment could not be allowed in a Missouri district, changing the ground of recovery from the common law to the common law as modified by a Kansas statute, which did away with the defence that the negligence complained of was that of a fellow servant, in actions against railroads. *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285. In the present case the change is a change in the allegations of fact, and was most material, because it necessarily was followed by a direct facing about with regard to the law. We shall not dispose of the case on this ground, but we think it proper to say that the difficulties in the way of upholding this amendment under the last mentioned decision have not been removed from our minds.

The fundamental questions in the case are whether the petitioners are within the Act of 1860, and if they are, whether they are not met by an exception to which we shortly shall refer. The former we shall not decide. The statute by § 1 gave a petition to any persons "who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant. . . . emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty or had the actual possession of the district or territory

in which the lands so claimed are situated." And somewhat similar language is used in § 11, allowing a proceeding in the District Court. There, however, the words apply only in case of a complete grant or concession and separation from the mass of the public domain prior to the cession to the United States, "or where such title was created and perfected during the period while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such territory."

The petitioners rely upon the words of the Act and upon *United States* v. *Morant*, 123 U. S. 335. That case involved lands in Florida, lying like the present east of the river Perdido, of which the grant was made before January 24, 1818, but the survey was not completed until afterwards. The Court, while intimating that such a grant well might have been held to be saved by the treaty, pointed out that the treaty was not signed until February 22, 1819, or possession taken until July, 1822, and held that the case was within the Act.

On the other hand, there must be, and it has been intimated that there are, some limits to the generality of the words of the statute. Certain large grants were expressly excepted from recognition by the King of Spain on his ratification of the treaty. The Act was not intended to bring them to life. There is a strong argument that it no more was intended to validate all other grants expressly annulled, but rather that what was aimed at was the so-called disputed territory lying west of the river Perdido, of which a short and clear account is to be found in *United States* v. *Lynde*, 11 Wall. 632. In the light of that history and in view of the alternative ground of decision kept open in *United States* v. *Morant*, if there are no other possible distinctions between that case and this, we also shall leave it open whether the intimation in that case is right, or whether the same justice was more accurate when he said, even with regard to grants of land in the disputed territory, that the intention of the Act was to validate them, "subject, of course, to the express exceptions of the treaty of 1819 and the supplementary declaration of the King of Spain finally annexed thereto." *United States* v. *Lynde*, 11 Wall. 632, 646, 647. See *McMicken* v. *United States*, 97 U. S. 204, 208, 209. *United States* v. *Clamorgan*, 101 U. S. 822, 825, 826 ; ("which passed by the Louisiana purchase" in 25 Lawy. Ed. 836).

However it may be as to the question upon which we have touched, we are of opinion that this case "comes within the purview of the third section of this act" (of 1860) in the words of § 11, in which event the petition is not allowed to be maintained. The third section provides for a division of the claims into three classes, numbers one and two containing claims which ought to be confirmed, number three containing those which ought to be rejected, "*Provided*, That in no case shall such commissioners em-

brace in said classes *number one* and *number two* any claim which has been heretofore presented for confirmation before any board of commissioners, or other public officers acting under authority of Congress, and rejected as being fraudulent, or procured or maintained by fraudulent or improper means." We are of opinion that this proviso excludes the petitioners, for the reasons which we proceed to state.

Before the Act of 1860 was passed, an Act of May 23, 1828, c. 70 § 6, (4 Stat. 284, 285,) authorized the presentation of certain land claims in Florida to a judge of the Superior Court of West Florida, subject to the restrictions of the Act of May 26, 1824, c. 173, (4 Stat. 52.) This claim was presented by the Innerarities for themselves and the Forbes heirs, and after a trial the prayer for confirmation of the title was "refused and rejected" for the reasons set forth in an opinion which is in the record before us. The general ground was the unwarranted alteration of the registro, which we have mentioned above. The judge was careful not to implicate the public officer, remarking that it would be unjust when he was not a party and had no opportunity of defence. He also stated that it was not intended to implicate the parties in interest. But he pointed out that the inducement for an alteration of the registro a year or two after it was made, when the time became essential in consequence of the treaty, was obvious, and as plainly intimated that he considered the alteration fraudulent, as he could without saying so in words. He simply avoided finding by whom the alteration was made. He quoted the Curia Filipica for the invalidity of a public instrument which does not authenticate alterations by a salvado, and he concluded that the claimants had no legal grant prior to January 24, 1818. He relied upon the absence of a salvado, no doubt, but only as one of the grounds for deciding that the alterations were made without authority of law, and as leading to the further consequence that the instrument was void.

The United States set up this adjudication as a bar under the abovementioned § 3. The petitioners make several replies. In the first place they contend that if a decision by a judge had been embraced within the proviso of § 3, he would not have been referred to in a slight, subordinate and alternative way, under the general head of 'other public officers acting under authority of Congress,' after the specific mention of 'any board of commissioners.' The reason seems plain enough however. The whole scheme of the earlier acts was that the claims should be presented to a board of commissioners. Act of May 8, 1822, c. 129. (3 Stat. 709.) March 3, 1823, c. 29. (3 Stat. 754.) February 8, 1827, c. 9. (4 Stat. 202.) The right to present a claim to a judge came in only by way of a late supplement in a limited number of cases. Act of May 23, 1828, c. 70, § 6. (4 Stat. 284, 285.) The judges referred to were judges of a Territorial Court established by the Acts of March 30, 1822, c. 13, § 6,

(3 Stat. 654,) and March 3, 1823, c. 28, § 7, (3 Stat. 750.) They were not District Judges, and there was a certain ambiguity in their standing which was under discussion when the Act of 1828 was passed and has been discussed since. *American Ins. Co.* v. *356 Bales of Cotton*, 1 Peters, 511. *McAllister* v. *United States*, 141 U. S. 174. It was most natural to use cautious words, but there was no other public officer which the Act of 1860 is likely to have had in mind. No further argument seems necessary to justify the conclusion that these judges were embraced within the actual as well as the literal meaning of the words used.

In the next place, it is said the claim was not found to be fraudulent or maintained by fraudulent or improper means. With regard to this we think that we have said enough already. The claim was found to be based upon an alteration, the motive for which was pointed out, and to be maintained by a reliance upon the unlawful alteration. The main contention is that the judge had no jurisdiction to reject the claim on that ground because, the moment that he decided the true date of the grant to be after January 24, he fell within a proviso of the Act of May 23, 1828, c. 70, § 6, (4 Stat. 285,) which excluded him from taking cognizance of any claims annulled by the treaty. *United States* v. *Baca*, 184 U. S. 653. It appears to us that this argument rests on too narrow a view of the statutes and of what was done. The claim as presented was within the judge's jurisdiction. He had authority to inquire whether it was so in fact. The document produced by the petitioner showed a claim which he could decide upon the merits, for the copy did not disclose the alteration. When the registro was put in it appeared that the date had been altered. He still had authority to decide whether the alteration was valid. He decided that it was unlawfully and fraudulently made. It would be an extraordinary refinement to say that he had authority to decide that it was made unlawfully but not to decide why it was unlawful. The illegality did not follow from the mere fact of alteration. Had there been a salvado it might have been valid. He could not come to his conclusion without some definite ground.

Moreover, while it is true that the limitation in § 6 of the Act of 1828 in form provides that the Act shall not be taken to authorize the judge to take cognizance of any claim annulled by the treaty, &c., in substance it is addressed to maintaining the invalidity of the excluded claims. The jurisdiction of the judge was no different from what it would have been if the proviso had declared that nothing in the Act should be taken to validate or to authorize the recognition of any claim which the treaty declared void. We are of opinion that the judge had authority to find the claim to be fraudulent and maintained by improper means.

The decree 'rejected' the claim upon the grounds which we have stated, and an opinion was expressed that the grant was not merely annulled by

the treaty, but void under Spanish law. But the objection remains to be answered that even if 'reject' was a proper term for the decree in such a case, and even if the jurisdiction to reject included authority to find that the claim had been saved from the treaty by fraud, still there was no jurisdiction to pass upon its validity apart from the treaty, and that, therefore, the claim now may be set up since the Act of 1860 has brought it to life. The proviso in § 3 of the Act of 1860, it may be said, refers to claims rejected on their merits, when all the merits as admitted by that Act were open. We are of opinion that there is no reason for thus artificially narrowing words that on their face include all cases. They include as well any claim which previously had been rejected as fraudulent or maintained by improper means, when the fraud addressed itself to avoiding the treaty, as when it related to some other fact material to the validity of the claim at the time when it was created. The fraud went to the merits of the case. For by the meaning of the act of 1828, as just explained, the date of the grant was as material to the validity of the claim as the authority of the Captain General of Cuba to convey on behalf of the King. Therefore it is our opinion that the claim is barred by the decree, even if it could escape from the other objections upon which we have found it unnecessary to pass.

Decree reversed.

True copy.

Test:

Clerk Supreme Court, U. S.